Supreme Court, U.S.
FILED
MAY 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

89-1938

Case No. _____

UNITED STATES SUPREME COURT

1990 Term

JOSEPH C. KIRCHDORFER and SKIP KIRCHDORFER, INC.,

Petitioners

v.

SECRETARY, U.S. DEPARTMENT OF LABOR,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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I.

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER MERE DISAGREEMENT WITH THE DEPARTMENT OF LABOR OVER MATTERS NOT DEFINED BY REGULATIONS OR WHERE THE GOVERNMENT FAILS TO FOLLOW ITS OWN REGULATIONS AUTOMATICALLY CONSTITUTES INTENTIONAL VIOLATION OF THE SERVICE CONTRACT ACT RESULTING IN DEBARMENT FOR THREE YEARS FROM PERFORMING CONTRACTS WITH THE UNITED STATES GOVERNMENT.

2. WHETHER OR NOT PETITIONERS' GOOD FAITH EFFORT TO COMPLY WITH REGULATIONS MAY BE HELD TO BE INTENTIONAL VIOLATIONS OF THE SERVICE CONTRACT ACT (41 U.S.C. §§ 351-358) SO AS TO SUPPORT DEBARMENT OF PETITIONERS FROM PERFORMING CONTRACTS FOR THE UNITED STATES WHEN RESPONDENT HAS FAILED TO PROVIDE INSTRUCTION AS REQUIRED BY THE REGULATION.

3. WHETHER RESPONDENT'S DECISION THAT PETITIONERS DELIBERATELY VIOLATED THE SERVICE CONTRACT ACT, AND RESPONDENT'S RELIANCE ON ALLEGED FACTS NOT IN EVIDENCE OR PART OF THE ADMINISTRATIVE RECORD, TO SUPPORT AN ORDER BARRING PETITIONERS FROM PERFORMING CONTRACTS FOR THE UNITED STATES VIOLATED THE ADMINISTRATIVE PROCEDURES ACT.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

II.

REPORTS AND OPINIONS OF THE COURTS AND ADMINISTRATIVE AGENCY BELOW.

1. Appeal is taken from the decision of the United States Circuit Court, Sixth Circuit: JOSEPH C. KIRCHDORFER AND SKIP KIRCHDORFER, INC., V. SECRETARY, U.S. DEPARTMENT OF LABOR, Case Number 89-5778, Opinion Filed February 16, 1990.

2. The Opinion appealed to the Circuit Court was the Opinion issued by the United States District Court for the Western District of Kentucky at Louisville, JOSEPH C. KIRCHDORFER AND SKIP KIRCHDORFER, INC., v. ANN MCLAUGHLIN, SECRETARY, U.S. DEPARTMENT OF LABOR, Civil Action Number 88-0771-1(b), filed May 26, 1989.

3. The Administrative Decision appealed to the United States District Court was the final decision of the Secretary of Labor, IN THE MATTER OF JOSEPH C. KIRCHDORFER d/b/a SKIP KIRCHDORFER, INC., Case Number 83-SCA-111, Issued September 28, 1988.

III.

GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED.

Petitioners appeal from the decision of the United States Circuit Court for the Sixth Circuit entered on February 16, 1990, affirming without discussion the decision rendered by the United States District Court for the Western District of Kentucky, as identified above, entered May 26, 1989.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

IV.

APPLICABLE CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS.

1. Fifth Amendment of the United States Constitution.

2. 5 U.S.C. § 706

3. 41 U.S.C. § 352(a),(b).

4. 41 U.S.C. § 354(a).

5. 29 C.F.R. § 4.6(b)(2) (1982).

6. 29 C.F.R. § 4.171(b) (1982).

7. 29 C.F.R. § 4.173(b) (1988).

8. 29 C.F.R. § 4.187 (1988).

9. 29 C.F.R. § 4.188(b)(1) (1988).

Provisions of the above-referenced citations are set forth in full in Appendix hereto.

V.

STATEMENT OF THE CASE

Petitioner Skip Kirchdorfer, Inc. ("Kirchdorfer") was awarded contracts to provide maintenance service at two installations of the United States Department of the Army, the period of which spanned portions of 1982 through 1985. In manning the contracts, Kirchdorfer complied with all provisions of 29 C.F.R. § 4.171(b)(1982) to establish pay scales for employees in positions not listed on the schedule of prevailing wages published by Respondent. Kirchdorfer continued to apply the provisions of 29 C.F.R. § 4.171(b)(1982) throughout the period of the contracts in the same manner as initially applied and approved by Respondent. Respondent deemed Kirchdorfer's subsequent application of

29 C.F.R. § 4.171(b)(1982) to constitute intentional violation of the Service Contract Act.

During the course of performance of the above-referenced contracts, Kirchdorfer paid employees vacation benefits in accordance with the provisions of 29 C.F.R. § 4.172(b)(2) by establishing a method of distinguishing between continuous employees and new employees as required by 29 C.F.R. § 1.173 (1982). Despite the absence of any regulatory guidelines for establishing a distinction between continuous and new employees, Respondent deemed Kirchdorfer's method a deliberate violation of the Service Contract Act.

Kirchdorfer maintained a method for accurately recording hours of overtime work by its employees which included a self-reporting system. During performance

of the contracts, Kirchdorfer provided to the contracting authorities detailed records as to the time worked by each of its service employees. Respondent refused to consider the detailed records but contrary to the rule stated in Anderson v. Mount Clements Pottery Company, 328 U.S. 680 (1946), relied on employees incomplete self-reporting records of hours worked and concluded that Kirchdorfer deliberately and intentionally failed to pay employees overtime benefits.

Respondent concluded that Kirchdorfer had failed to pay a total of approximately Fifteen Thousand Dollars ($15,000.00) to an aggregate of fourteen (14) employees employed under contracts totalling in excess of Four Million Dollars ($4,000,000.00), and that Kirchdorfer was liable for said $15,000 to its employees. In addition, Respondent's conclusion that

all of the above-said alleged violations were deliberate compelled Respondent to conclude that extenuating circumstances did not exist such as to relieve Kirchdorfer from the debarment provisions of the Service Contract Act (41 U.S.C. § 354(a)).

In rendering the initial decision to debar Petitioners pursuant to the provisions of 41 U.S.C. § 354(a), the Courts below and the Administrative Tribunal erroneously attributed prior federal labor law violations to Petitioners despite the total absence of any evidence in the record of such prior violations. In addition, Petitioners were held responsible for failure to pay proper wages and benefits to one employee based solely on allegations contained in the initial Complaint and without any evidence of record that the employee was not fully

paid in accordance with Federal wage and hour law requirements.

In determining that Petitioners intentionally violated Federal wage and hour laws in this instance, the courts below failed to apply the teachings enunciated in McLaughlin v. Richland Shoe Co., 108 S.Ct. 1677, ___ U.S. ____, (1988). In addition, the proceedings below improperly applied provisions of Anderson v. Mount Clemens Pottery Co., 328 U.S. 680 (1946) by shifting the burden of proof to Petitioners without having determined that wage and hour violations existed based on the most accurate basis possible under the circumstances.

The basis for federal jurisdiction in the court of first instance, Administrative Proceedings before an administrative law judge, raised issues related to the Federal Service Contract

Act, the Federal Contract Wage, Hours and Safety Standards Act, and regulations promulgated thereunder and were probably subject to Administrative Procedures Act, and thereby provide the basis for federal jurisdiction.

VI.

REASONS FOR ALLOWANCE OF THE WRIT

A. The Court of Appeals for the Sixth Circuit decided an important question of federal law which is in conflict with decisions of the United States Supreme Court, as enunciated in McLaughlin v. Richland Shoe Co., 108 S.Ct. 1677, ____ U.S. ____ (1988).

In its good faith effort to comply with the requirements of 29 C.F.R. § 4.171(b)(2) (1982) establishing wage rates for employees in job classifications not identified on Respondent's prevailing wage lists, Kirchdorfer strictly applied

the clearly stated requirements of the directives of that regulation. Regulation provided that where there is disagreement, Respondent's own-site representative must seek clarification from Respondent's appropriate office. Respondent breached the regulatory requirement and held Kirchdorfer liable for the breach, deeming it to be intentional, which position has been sustained by the courts of appeals below. The conclusions of the Courts below is in direct conflict with the Supreme Court's holdings in Richland Shoe, supra.

B. The findings and conclusions of Respondent, sustained by the courts of appeals below, were based, in part, on the shifting of the burden of proof of non-violation of the Service Contract Act to Kirchdorfer, contrary to the directive stated by the United States Supreme Court

in Anderson v. Mount Clemens Pottery Co., 328 U.S. 680 (1946).

In Mount Clemens Pottery, the Supreme Court ruled that Respondent has the burden of proof that an employer violated Federal wage and hour laws up to the point that Respondent proffers evidence in the form of the most accurate basis possible under the circumstances, at which point the burden to prove shifts to the employer to demonstrate no violation of the law. The record of proceedings before Respondent establishes that the most accurate basis possible for determining the amount of time worked by individual employees was information contained on service call cards which, at all times, were in the possession of the Government. Respondent never proffered this evidence, and the Administrative Law Judge improperly shifted the burden of proof of non-

violation to Kirchdorfer. The Courts of Appeals below have sustained the Administrative Law Judge's abuse of discretion. The decision of the Courts of Appeals below is in direct conflict with standing decisions of the Supreme Court.

C. Decisions in the proceedings below relied on alleged facts outside of the administrative record in violation of applicable provisions of the Administrative Procedures Act, and constitutes a taking without due process of law in violation of the Fifth Amendment of the Constitution.

The Administrative Law Judge, sustained by the courts of appeals below, found that Kirchdorfer failed to pay certain employees wages and fringe benefits. Respondent failed to present any evidence that certain employees were not properly

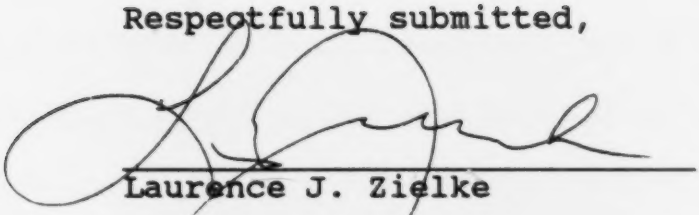
paid in accordance with Federal wage and hour laws.

D. Respondent, in reviewing the Administrative Law Judge's findings and conclusions, despite arguments presented by Kirchdorfer, failed to acknowledge a total absence of evidence on which certain assessments against Kirchdorfer were recommended by the Administrative Law Judge. It is evident that Respondent failed to employ the requisite standard of review in adopting the ALJ's findings and conclusions. Greater Boston Television Corp. v. Federal Communications Comm., 467 F.2d 841 (D.C. Cir.) cert. denied, 91 S.Ct. 229, 403 U.S. 923, cert. denied, 92 S.Ct. 30, 404 U.S. 877, cert. denied, 92 S.Ct. 2042, 406 U.S. 943 (1970). As a result, Kirchdorfer has been ordered to relinquish substantial amount of money, which order constitutes a taking without

due process of law in violation of the Fifth Amendment to the Constitution.

E. The decision to debar Kirchdorfer from accepting further Government contracts was based, in part, on improper application of the rule enunciated in McLaughlin v. Richland Shoe Co., supra, and on consideration of alleged facts not in evidence, constituting an abuse of discretion, was arbitrary and capricious, not in accordance with law and constitutes an excess of statutory right and authority in violation of the Administrative Procedures Act. First Girl, Inc. v. Regional Manpower, Administrator of U.S. Department of Labor, 499 F.2d 122 (9th Cir., 1974).

Respectfully submitted,



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UNITED STATES SUPREME COURT

1990 Term

JOSEPH C. KIRCHDORFER and SKIP KIRCHDORFER, INC.,

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v.

SECRETARY, U.S. DEPARTMENT OF LABOR,

Respondent.

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APPENDIX

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NOT RECOMMENDED FOR PUBLICATION

No. 89-5778

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH C. KIRCHDORFER and SKIP KIRCHDORFER, INC.,	)	
Plaintiffs-Appellants,	)	
	)	ON APPEAL
	)	FROM THE
v.	)	UNITED
	)	STATES
	)	DISTRICT
SECRETARY, U.S. DEPARTMENT OF LABOR,	)	COURT FOR
	)	WESTERN
	)	DISTRICT OF
Defendant-Appellee.	)	KENTUCKY.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to prominently displayed if this decision is reproduced.

Decided and Filed _____

BEFORE: MILBURN and NORRIS, Circuit Judges; CONTIE, Senior Circuit Judge

PER CURIAM. Plaintiffs, Joseph C. Kirchdorfer and Skip Kirchdorfer, Inc., appeal from the order of the district court granting summary judgment to defendant, Secretary of the United States Department of Labor.

Having had the benefit of oral argument, and having carefully considered the record on appeal and the briefs of the parties, we are unable to say that the district court erred in granting summary judgment to defendant.

As the issuance of a written opinion by this court would be duplicative and serve no useful purpose, in view of the district court having articulated the reasons why judgment should be entered for defendant, the judgment of the district court is **affirmed** upon the reasoning set out by that court in its

opinions of March 1, 1989 and May 26, 1989.

MANDATE: issued 3/30/90

COSTS: taxed (appellee to recover $207.00)

A TRUE COPY
Attest: Leonard Green, Clerk

By: /s/ C.B. Orkoweeki
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

JOSEPH C. KIRCHDORFER, et al.,
Plaintiffs,

v. No. C 88-0771-L(B)

ELIZABETH DOLE, in her capacity
as SECRETARY OF THE U.S. DEPARTMENT OF
LABOR,
Defendant.

O R D E R

For the reasons set forth in the memorandum filed this date,

IT IS ORDERED that the motion of the defendant, Elizabeth Dole, in her capacity as Secretary of the U.S. Department of Labor, for summary judgment be and it is hereby granted, and this action be and it is hereby dismissed with prejudice.

There is no just reason for delay, and this is a final and appealable order.

This 26th day of May, 1989.

/s/ Thomas A. Ballantine, Jr.

THOMAS A. BALLANTINE, JR.
United States District Judge

Copies to Counsel

Entered May 26, 1989

Jesse w. Grider, Clerk

By _____
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

JOSEPH C. KIRCHDORFER, et al.,
Plaintiffs,

v. No. C 88-0771-L(B)

ELIZABETH DOLE, in her capacity as SECRETARY OF THE U.S. DEPARTMENT OF LABOR,
Defendant

MEMORANDUM

Plaintiffs, Joseph C. Kirchdorfer and Skip Kirchdorfer, Inc. (Kirchdorfer), brought this action against the defendant, Elizabeth Dole, in her capacity as Secretary of the U. S. Department of Labor[1] (Secretary), for declaratory and injunctive relief and review of a final administrative decision by the United States Department of Labor (DOL). After a formal hearing, Kirchdorfer was found in Violation of the

[1] This case was originally filed against Ann McLaughlin, Elizabeth Dole's predecessor as Secretary of Labor. F.R.Civ.P. 25(d) (1).

McNamara-O'Hara Service Contract Act of 1965, as amended (the SCA), Title 41 U.S.C. § 351 et seq., the Contract Work Hours and Safety Standards Act (the C.W.H.S.S.A.), Title 40 U.S.C. 327-332, and the regulations at 29 C.F. R. Parts 4 and 6. The ALJ recommended that plaintiffs' name be placed on the Comptroller General's list of debarred bidders, thereby prohibiting plaintiffs from bidding on and obtaining government contracts for a period of three years. The ALJ's findings and recommendations were affirmed by the Deputy Secretary of Labor. This action is now before the Court on the motions of the parties for summary judgment. F.R.Civ.P. 56.

Plaintiffs contend that the ALJ's decision was arbitrary and capricious because it was based on insufficient evidence and the ALJ improperly

interpreted the applicable regulations. Plaintiffs also complain that the final decision of the Deputy Secretary did not reflect the plaintiffs' post-hearing brief, but was simply a "rubber stamp" of the ALJ's allegedly erroneous findings and recommendations.[2] Plaintiffs state that they have appealed from the Deputy Secretary's final decision in order to obtain an objective review of the administrative record.

The scope of judicial review is governed by Title 41 U.S.C. § 353 which provides that the ALJ's findings of fact shall be conclusive if supported by a preponderance of the evidence. Midwest Maintenance & Construction Company v. Vela, 621 F.2d 1046, 1048 (10th Cir.

[2] The Deputy Secretary's opinion consisted of 20 pages in which each allegation of error was addressed.

1980). The standard of judicial review is governed by Title 5 U.S.C. 706(2)(A) which authorizes a reviewing court to set aside an agency decision only if it is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. In questions of interpretation of regulations, a reviewing Court must show great deference to the interpretation given by the agency charged with the administration of the regulations. Train v. Natural Resources Defense Council, 421 U.S. 60, 95 S.Ct. 1470, 43 L.Ed.2d 731 (1975). A reviewing court must follow the agency's interpretation of its regulations unless such interpretation is clearly erroneous. March Oil Co. v. Lee, 241 P. 804, 113 Ok. 242, cert. denied, 270 U.S. 658, 46 S.Ct. 354, 70 L.Ed. 785 (1924).

In Chevron, U.S.A. Inc. v. Natural

Resources Defense, 467 U.S. 837, 104 S.Ct. 2778 (1984), the Court articulated the function of a court faced with review of an agency's construction of the statute which it administers:

"When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

"The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.' Morton v. Ruiz, 415 U.S. 199, 231, 94 S.Ct. 1055, 1072, 39 L.Fed.2d 270 (1974). If Congress has explicitly left a gap for the agency to

fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."

467 U.S. at 842, 104 S.Ct. at 2781.

The administrative hearing was held on March 3, 1986. In addition to documentary evidence, the ALJ heard testimony on behalf of DOL from two Wage and Hour Division compliance officers, an Air Force contract administrator and several of plaintiffs' employees; Joseph Kirchdorfer testified on his own behalf. Certain testimony of Kirchdorfer was not documented and much of it was contradicted by DOL's witnesses. The plaintiffs object to the determination of the ALJ to discredit Kirchdorfer's

testimony in the face of conflicting evidence.

It is not the function of a reviewing court to decide the credibility of witnesses unless the record reflects that the ALJ was clearly erroneous in doing so. NLRB v. Jacob E. Decker and Sons, 569 F.2d 357 (5th Cir. 1978) . It was not clearly erroneous for the ALJ to find, based on witness testimony, that Neal O'Donnell had not received vacation pay; John Milham and James Rudolph had not received earned overtime pay; Nelson Longcrier's job had been misclassified; a contract administrator had met with plaintiffs' supervisory personnel to explain the proper conformance procedures and the requirement of paying subsequently classified employees the determined wage rate and that Charles Cook, John Davies, Hal Jones, Angela

Smith, Julie Tatum and Christine Chodnicki were not paid the contractual conformed wage rates for the jobs they performed and that Kirchdorfer had represented to certain employees of the predecessor contractor that they were to be hired as continuous employees. Plaintiffs argue that their right to due process of law was violated by the ALJ's acceptance of documentary evidence submitted by DOL after the hearing. The evidence was submitted in response to Kirchdorfer's testimony regarding a new matter and showed that plaintiffs' employee, Frank Krzynowek, had worked continuously for the predecessor contractor before he was hired by the plaintiffs. Kirchdorfer had previously testified that he had telephoned the predecessor contractor and was told that Krzynowek had been fired a month before

the predecessor contractor's contract was terminated.[3] Plaintiffs complain that the submission of such evidence is impermissible because there was no opportunity to "cross-examine" or limit the evidence.

Agencies are not bound by the strict rules of evidence governing jury trials. Under Title 5 U.S.C. § 556(d), an agency need only exclude "irrelevant, immaterial or unduly repetitious evidence."

Plaintiffs do not argue that the evidence lacked relevancy, competency or materiality. They have not shown how the evidence could have been limited and there is no claim that the plaintiffs attempted to refute the evidence after its submission and before the ALJ's

[3] It must be noted that Kirchdorfer's testimony would be inadmissible as hearsay in a suit between private parties. Fed.R.Evid. 802.

ruling. The evidence did not directly contradict Kirchdorfer's testimony that he had received certain information over the telephone, but simply established that Krzynowek was employed during the time Kirchdorfer was told he had been terminated. Plaintiffs argue, in the alternative, that the documentary evidence supported Kirchdorfer's testimony by showing a break in Krzynowek's employment during the relevant time period and therefore the ALJ's determination that Krzynowek was employed prior to being hired by Kirchdorfer was arbitrary and capricious.

It was not arbitrary or capricious for the ALJ to find that a break in employment did not constitute a "firing."

The ALJ's findings that wage violations had been committed by plaintiffs are supported on the record by a

preponderance of the evidence.

Plaintiffs argue that the ALJ and the Deputy Secretary misinterpreted the conformance procedures set forth at 29 C.F.R. 4.6(b)(1982), as amended (1983).[4] The applicable regulations provide that any class of service employee not listed on the wage determination should be classified by the contractor and paid a wage rate and fringe benefits determined by the contracting agency, the contractor and the employees. Kirchdorfer interpreted this regulation to mean that each time a new employee accepted a position not listed on the wage determination, new wage rates and fringe benefits would be negotiated. The agency's interpretation of the regulation is that once a class of service employees

[4] The 1982 regulations were in effect when the relevant government contract was awarded.

and an accompanying wage rate and fringe benefit is agreed upon, it is incorporated into the contract and becomes conformed so that any new employee would assume the same classification, wages, and benefits.

The agency's construction of the regulation is reasonable and must be given controlling weight. Chevron U.S.A. Inc., supra. The ALJ found that Kirchdorfer had been informed repeatedly of the agency's interpretation of 29 C.F.R. Part 4 and yet refused to follow it, insisting instead that his unsubstantiated interpretation was correct. It was not erroneous for the ALJ to find that oral communication of the agency's policies was sufficient notice, in lieu of a formal written opinion.

It was not error for the ALJ to disregard time records not before the ALJ.

Plaintiffs argue that unusual circumstances exist which would warrant relief from the debarment sanction imposed by the Comptroller General. 29 C.F.R. § 4.188(b)(1). Plaintiffs argument has been extensively addressed in an earlier memorandum opinion, dated March 1, 1989, dismissing plaintiffs' claim for injunctive relief and will not be reiterated here.

The motion of the plaintiffs, Joseph C. Kirchdorfer and Skip Kirchdorfer, Inc., for summary judgment will be denied. The motion of the defendant, Elizabeth Dole, in her capacity as Secretary of the U. S. Department of Labor, for summary judgment will be granted.

An appropriate order has been entered this 26th day of May, 1989.

THOMAS A. BALLANTINE, JR.
United States District Judge

Copies to counsel

ENTERED May 26, 1989
Jesse W. Grider, Clerk
By: _____
Deputy Clerk

U. S. DEPARTMENT OF LABOR
Deputy Secretary of Labor
Washington, D.C.
20210

DATE: September 28, 1988
CASE NO. 83-SCA-11

IN THE MATTER OF

JOSEPH C. KIRCHDORFER
d/b/a SKIP KIRCHDORFER, INC.,
RESPONDENT.

BEFORE: THE DEPUTY SECRETARY OF LABOR [1]

FINAL DECISION AND ORDER

This case is before me under the Service Contract Act of 1965, as amended (SCA or the Act), 41 U.S.C. §§ 351-358 (1987), and the regulations at 29 C.F.R. Part 4 (1987). Respondent seeks review of the decision and order (D. and O.)

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[1] The Deputy Secretary has been designated by the Secretary to perform the functions of the Board of Services Contract Appeals pending the appointment of a duly constituted Board. 29 C.F.R. § 8.0 (1987); Department of Labor Executive Level Conforming Amendments of 1986, Pub. L. No. 99-619 (November 6, 1986).

issued by Administrative Law Judge (ALJ) James W. Kerr, Jr., on November 23, 1986.

This case involves military housing maintenance at two separate military installations under two contracts with the Air Force: the first running from November 1, 1980, to October 31, 1982, at Patrick Air Force Base in Florida, and the second at Maxwell-Gunter Air Force Base in Alabama from October 1, 1981, to September 30, 1982, and extended until September 30, 1984.

Both contracts required that vacation be paid after a specified length of service "with a contractor or successor," and that "Length of Service includes the whole span of continuous service with the present (successor) contractor, wherever employed, and with predecessor contractors in the performance of similar work at the same Federal facility."

Complainant's Exhibits 1 and 2 (emphasis supplied).

At issue are the first contractual year's vacation eligibility for one employee at Patrick Air Force base and three employees under the Maxwell-Gunter contract, and whether Respondent's refusal to credit these employees with service from the predecessor contract violated the Act. The ALJ ruled that it did, as follows:

> 2. Respondent's practice of not treating as "continuous" any employee not hired within the first payroll period does not withstand the dictates of the regulations. According to the regulations, all the facts in the particular case must be examined, and the primary factor in determining whether there has been a break in service is the reason for the employee's absence from work. An arbitrary time period of five or less working days prohibits any due consideration of the particular facts of the case and the reasons for the absence.
>
> 3. Because the weight of the evidence supports the conclusion that Respondent intended for each of the predecessor's employees to continue working under Respondent's contracts, it is the Court's

finding that the alleged break in service was no more than a "temporary lay off." Consequently, even if the employee was hired subsequent to the Respondent' s first payroll period, the employee may still be a continuous employee for purposes of vacation entitlement. See 29 C.F.R. § 4.173 (b) (2) (1985).

D. and O. at 9 (emphasis in original).

Respondent had further claimed that one employee, Neal O'Donnell, had been paid one week's vacation. The ALJ did not agree, as follows:

5. Respondent has alleged that its exhibit "E", a check issued to O'Donnell in the amount of one week's pay, represents the disputed one week of vacation entitlement. However, O'Donnell testified that he received "two weeks twice." (TR 151). Also, Respondent's own records indicate that O'Donnell has worked during the payroll period which the check represented. (RX-1). Accordingly, there is no evidence to substantiate vacation pay due the employee over and above the employee's regular wages for the week of work.

D. and O. at 11, 12.

Respondent alleged that the ALJ "disregarded" evidence regarding vacation payment to employee O'Donnell. The ALJ's

findings were based on his consideration of this evidence and his evaluation of the credibility of the witnesses. D. and O. at 11, 12.

Respondent also objects to the receipt of post-hearing evidence with regard to the vacation pay claim of employee Krzynowek. It was proper for the ALJ to permit such evidence regarding an issue not raised before the hearing. As the Administrator's brief notes, Respondent does not refute the authenticity of the post hearing documents which supported the Administrator's position and the ALJ's finding. Statement for the Administrator at 47, n.7. Respondent made the unsubstantiated claim that he had previously advised the Department of Labor about his method for computing vacation pay eligibility, which resulted in these violations, and that he

had been told, "to set a policy and be consistent." Hearing Transcript (T.) at 218. If such "advice" were given it is "not a defense against a contractor's liability for back wages under the Act." See 29 C.F.R. § 4.187(e) (5).

The ALJ made his finding and reached his conclusion on this issue based on his evaluation of the evidence presented and his judgement of the credibility of the witnesses who testified before him. I adopt his findings of fact and conclusions on the vacation pay issue as being supported by a.preponderance of the evidence and in accordance with law. See 41 U.S.C. § 353; Midwest Maintenance and Construction Co. v. Vella, 621 F.2d 1046, 1048; American Waste Removal v. Donovan, 26 WH Cases 1591, 1593 (10th Cir. 1984).

The ALJ found that two air conditioning mechanics, Johnny Milham and James

Rudolph, who worked afternoon shifts and on weekends, were entitled to overtime pay they had not received, based on their testimony and that of two compliance officers who had inspected the available "sign-in sheets" record. The ALJ's conclusions were as follows:

26. As to the employees Johnny Milham and James Rudolph, both evening air conditioning maintenance workers, the most accurate record of their number of hours actually worked was the service call cards. A service call cards or work order card, showed the address of the unit, the signature of the occupant and the time of performance of the week in question. (TR. 54, 57-58, 258, 292). However, these service call cards were not introduced into evidence. Mr. Kirchdorfer asserted that the cards are the property of the Maxwell Air Force Base. It is noted that Respondent admitted that these cards were the most accurate reflection of the hours worked by Mr. Milham and Mr. Rudolph, but were not used for payroll purposes or timekeeping. (TR. 292-293).

27. Upon their initial hire as air conditioning maintenance workers, Mr. Milham and Mr. Rudolph diligently signed in upon arriving at work and signed out upon departing. During the initial period of employment, these sign-in sheets accurately reflected the number of

hours they worked. (TR. 55-57, 111-113). After a "month or so," Mr. Bradley informed Mr. Milham that he need not sign-in any longer because Milham would be paid for forty hours of work per week regardless of the hours reflected on the sign in sheets. Thereafter, Mr. Milham was less consistent about signing in. Similarly, Charles Clark, who had hired Mr. Rudolph, informed Mr. Rudolph that there was no longer a need to sign in, as he would not be paid for any hours in excess of forty per week. (TR. 109-112). At this point, Mr. Rudolph discontinued signing in.

28. Based upon Mr. Makowsky's computations in Complainant's exhibits 13, 14 and 15, it is apparent that Respondent did not use the sign-in sheets as a basis for the number of hours worked by Messrs. Milham and Rudolph. Nevertheless, it is the finding of this Court that the sign-in sheets are an accurate reflection of the minimal hours worked by Mr. Milham, since he continued to sign in, though less consistently.

D. and O. at 7.

Johnny Milham

1. Milham, a Maxwell employee, was hired by Respondent as an air conditioning mechanic in July of 1983 to perform evening and weekend work. It was Mr. Milham's testimony that he worked generally from 3:00 or 4:00 pm. until 12:00 or 1:00 a.m. Monday through Friday, and also during the days on Saturday and Sunday.

2. As was previously stated in paragraph 27, Mr. Milham consistently signed in and out during his initial period of employment until he was told by Mr. Bradley that there was no need to sign in, since he was going to paid for only forty hours per week of work. (TR. 55). Notwithstanding the fact that Mr. Milham signed in less consistently toward the latter period of his employment, the sign-in sheets accurately represent the number of hours Mr. Milham worked during his initial period of employment. (TR. 56). In any event, the hours logged on the sign-in sheets reflect the minimum hours which Mr. Milham worked each week.

3. Mr. Milham testified at the hearing that he worked anywhere between fifty and seventy hours per week. (TR. 68). This estimation comports with the sign-in sheets which were used by the compliance officer to compute the wages due to Mr. Milham. (CX-14).

4. The wage transcription and computation sheet completed by Mr. Makowsky relative to Mr. Milham evinces the fact that the Respondent consistently paid Mr. Milham for approximately forty hours of work per week, despite the fact that the employee consistently logged in greater than forty hours per week on the sign-in/sign-out sheets. (CX-14). Consequently, Mr. Milham is due backwages for the hours he worked in excess of the forty hours per week for which he was paid. This amounts to a total of $969.38. (CX-14).

5. Upon comparison of Respondent's certified payroll records with the hours reflected on the sign-in/sign-out sheets, it is evident that Respondent's payroll records were grossly inaccurate. The certified payroll records reflect that Mr. Milham never worked on Saturdays or Sundays. To the contrary, the evidence of record substantiates the fact that Mr. Milham was hired to work weekends and did regularly work on the weekends. (CX-14: TR. 52-54).

James Rudolph

1. Mr. Rudolph was hired by Respondent as an air conditioning mechanic under the Maxwell contract. Upon being hired, he was told by Charles Clark that he would earn $8.56 per hour and would work forty hours per week. (TR. 109-110).

2. In actuality, Mr. Rudolph was required to work seven days per week, working similar shift hours as Mr. Milham, 4:00 p.m. to 12:00 midnight Monday through Friday plus weekends.

3. As did Mr. Milham, Mr. Rudolph consistently logged his hours on the sign-in/sign-out sheets during the initial period of his employment. Thereafter, Mr. Clark informed him that there was no need to sign in because he would not be paid for overtime work. (TR. 111-112).

4. Because no basic payroll or time records were available to Mr. Makowsky during his second investigation of Respondent, Mr. Makowsky reconstructed the number of hours Mr. Rudolph had

worked. (TR. 190-191, 203-204). Following his personal interview with Mr. Rudolph, Mr. Makousky computed the backwages which were due Mr. Rudolph for overtime work. These computations were based upon Mr. Rudolph working minimally fifty-five hours per week for 75% of the weeks which he worked for Respondent. Respondent in fact paid Mr. Rudolph for forty hours of work per week. (TR. 203; CX-15).

5. Mr. Rudolph is due backwages totalling $2,781.00 for hours worked overtime during his employment with Respondent. (CX-15). These computations are supported by testimony at the hearing that Mr. Rudolph generally worked seven days per week, with his shortest work week consisting of fifty-five hours of work. (TR. 110-111).

D. and O. at 12-14.

Respondent argued the reliability of the employees' testimony, but he provided no substantiation of the actual hours he claimed the employees had worked.

The ALJ concluded that another employee, Nelson Longcrier, had been misclassified as a supply clerk at the rate of $6.00 per hour while performing quality control work at $10.25 per hour,

25% of the time. The ALJ credited the employee's testimony over that of Respondent, as follows:

Nelson Longcrier

1. Mr. Longcrier was hired by Respondent under the Maxwell contract as a supply clerk at a rate of $6.00 per hour. (RX-L). This was the proper contractual conformed rate for a supply clerk. (CX-11).

2. However, Mr. Longcrier eventually began performing quality control work. Mr. Longcrier attested at the hearing that he performed supply clerk duties and those of quality control conjointly. (TR. 168-169). The contractual conformed rate for quality control was $10.25 per hour. (CX-3 and 5).

3. The court finds that the evidence of record supports the assertion that Mr. Longcrier performed quality control work in addition to supply work. According to Mr. Longcrier, each morning Mr. Clark, another quality control worker, would present him with a list of houses requiring inspection. (TR. 169). The testimony of Ms. Chodnicki corroborates Mr. Longcrier's involvement in quality control work. (TR. 97-98).

4. Mr. Makowsky's computation of monies due Mr. Longcrier are based upon the employee spending 25% of his time performing quality control work. This percentage is supported by Mr. Longcrier's testimony which indicated

that he spent between 25% to 50% of his time in the performance of quality control work.

5. Consequently, Mr. Longcrier is due the sum of $935.00 as a result of Respondent's misclassification of the employee. This amount represents 25% of Mr. Longcrier's time as a quality control worker. (TR. 202; CX-15).

D. and O. at 7.

With respect to the claim concerning employees Milham, Rudolph, and Longcrier, I rely on the ALJ's credibility determinations and affirm his findings of fact and conclusions. The ALJ is uniquely qualified to make credibility determinations, N.L.R.B. v. Jacob E. Decker and Sons, 569 F.2d 357, 364 (5th Cir. 1978), and since resolution of this issue depends on witness credibility, special deference must be paid to the ALJ's conclusion. Center Property Management v. N.L.R.B., 807 F.2d 1264, 1268 (5th Cir. 1987). See also N.L.R.B. v. Walton Mfg. Co., 398 U.S. 404, 408

(1962), and the Secretary's decision in McDaniel v. Boyd Brothers Transportation, Case No. 86-STA-6 (March 16, 1987), slip op. at 3.

The third issue concerns the ALJ's finding that Respondent had violated the Act by failing to pay the required wage rates to six employees working in conformed job classifications. The ALJ's findings of fact and conclusion were as follows:

Conformed classification and Wages

1. The following conformed classes and corresponding minimum wage rates were properly confected and incorporated into the Maxwell Contract by amendment:

Service Call Clerk	$ 6.00 per hour	(CX-4)
Desk Clerk	$ 5.00 per hour	(CX-4)
Chief Clerk	$ 7.50 per hour	(CX-5)
Quality Control	$10.25 per hour	(CX-5)
Service Call Clerk	$ 7.06 per hour	(CX-6)

2. Upon the incorporation of the conformed classes and minimum wage rates into the Maxwell contract, Respondent was required to pay subsequent employees hired into the conformed class the specified minimum wage. (CX-2; TR. 83, 206; 29 C.F.R. § 4.6(b) (2) (i) and §

4.6(b)(2)(i)(v) (1985)). It is explicitly stated in the regulations that, once the conformed class and rate are determined pursuant to the specified conforming procedure, this wage rate must be paid to all employees performing in the classification from the first day on which contract work is performed by them in the classification. Furthermore, failure to pay the employees the compensation agreed upon by the "interested parties" and/or finally determined by the Wage and Hour Division shall be a violation of the Act and this contract. The "interested parties" include the contractor, the employee and the contracting officer. (29 C.F.R. § 4.6(b) (2) (ii) (1985)).

3. Despite the mandate of the regulations, Respondent testified at the hearing that he unilaterally lowered the conformed wage rate for subsequently hired employees without the approval of the contracting officer, paying the wage rate he thought was commensurate with the particular employee's qualifications and experience. (TR. 253-284, 287).

4. Respondent was required per the regulations and the contract to pay employees subsequently hired into the conformed class the agreed upon minimum wage rate as incorporated into the contract. This requirement was discussed with Mr. Kirchdorfer and Respondent's project managers on numerous occasions. (See paragraphs 20, 21, and 29).

D. and O. at 14.

20. On at least three occasions, Gary Williams, a compliance officer with the Wage and Hour Division, explained to and discussed with Mr. Kirchdorfer the issue of conforming rates. Mr. Williams described the procedure which must be used to conform a classification of employees and minimum wage rate. He further explained that, once the rate is agreed upon by the contractor, employee and contracting officer, it becomes part of the contract, and employees subsequently hired into this position must be paid the agreed upon rate. (TR. 74, 80-83).

21. Additionally, Peggy Jolly, the contract administrator who was responsible for the Maxwell contract, personally met with Sidney Bradley and Charles Clark, both supervisory personnel of Respondent under the Maxwell contract, and explained to them the proper conformance procedures. She also advised them of the necessity of posting the conformed rates along with the wage determination. (TR. 172, 179-180). As the Respondent's manager, Mr. Bradley had the full authority to act on behalf of the Respondent. (TR. 187).

D. and O. at 5, 6.

29. Referring to paragraphs 8, 9 and 10, it is established that the conformance classifications and minimum wage rates had been incorporated into the Maxwell contract for desk clerk, service call clerk, quality control, chief clerk and service call clerk. It has also been established that on several occasions, the conformance procedure and the

requirement of paying subsequently classified employees the determined conformed rate were discussed with Mr. Kirchdorfer. (See paragraphs 20 and 21). Notwithstanding his knowledge, Mr. Kirchdorfer attempted to pay subsequently classified employees a lesser wage than the conformed rate.

30. According to Ms. Jolly, the contract administrator, the respondent was advised that if a new wage determination was incorporated into the contract, Respondent was to invoice her office for increased costs under the new wage determination. Consequently, Respondent submitted invoices to the office which included increased costs for a quality control and service call clerk. Ms. Jolly discovered, though, that respondent was not paying the employees the con formed rates previously incorporated into the contract, whereupon her office returned the invoices and advised Mr. Kirchdorfer to correct the invoices.

(TR. 177-178; CX-11) Ms. Jolly's office could not reimburse Respondent for the invoices because Respondent was paying less than it was billing. (TR. 178).

31. It was the testimony of Ms. Jolly that each time a conformed classification position was vacated, Respondent would then submit a conforming rate at a lower rate that was originally conformed. (TR. 174). Respondent did not refute this contention. Rather, Mr. Kirchdorfer corroborated it by stating at the hearing that any time he hired a new employee per an established classification, he had the authority to change the wage rate based

upon his judgment as to the employee's qualifications and experience. (TR. 283-284, 287). Mr. Kirchdorfer further claimed that Ms. Jolly at no time informed him that his belief was incorrect. However, the court finds that evidence overwhelmingly establishes that Mr. Kirchdorfer was aware that he could not lower the wage rate at his own discretion. That he was required to pay the conformed rate was explained to him on numerous occasions by Mr. Williams and Ms. Jolly. (See paragraphs 20 and 21). This requirement was also contained in the Maxwell contract. (See paragraph 12).

D. and O. at 7, 8.

Charles Clark

1. Mr. Clark, an employee of the Respondent at Maxwell-Gunter Air Force Base, was hired to perform quality control work at a rate of $9.00 per hour. (RX-J).

2. The contractual conformed rate for quality control was $10.25 per hour. (CX-3 and 5).

3. Respondent failed to pay Mr. Clark the required minimum wage rate. Therefore, Mr. Clark is due the sum of $3,820.76 as

a result of Respondent's violations.[4] (CX-10, 11 and 15).

John Davis

1. Mr. Davis was initially hired by Respondent at Maxwell-Gunter Air Force Base as a service call clerk. During the last month of his employment with Respondent, Davis performed quality control work. That Mr. Davis performed this type of work is supported by his description at the hearing of his duties. (TR. 120-123). This Court rejects Mr. Kirchdorfer's assertion that Mr. Davis performed no quality control work. Mr. Davis testified that Charlie Clark, another quality control worker, instructed him as to the responsibilities the position entailed. (TR. 126). Also, Mr. Davis stated that he would inspect

[4] The fact that Respondent alleges to have additionally paid Mr. Clark $240.00 per month for housing rent is of no avail. The regulations provide that the employer may include as part of the applicable minimum wage the reasonable cost, as determined by the Administration, of furnishing an employee with "board, lodging, or other facilities" in situations where such facilities are customarily furnished to employees for the convenience of the employees. (29 C.F.R. § 4.167 (1985)). Respondent in the case at bar offered no evidence that this was a situation where "such facilities are customarily furnished to employees." Moreover, such cost for rent has not been approved by the Administrator or his authorized representative.

the houses after the maintenance work had been done, rather than before. (TR. 122-123). Thus, there is ample evidence supporting the assertion that Mr. Davis performed quality control work during one month of employment with Respondent.

2. The contractual conformed rate for quality control was $10.25 per hour. (CX-3 and 5).

3. Respondent failed to pay Mr. Davis the required minimum wage rate. Therefore, Mr. Davis is due the sum of $293.09 as a result of Respondent's violations. (CX-10, 11, and 15). This computation is based upon one month of quality control work.

Hal Jones

1. Mr. Jones, an employee of the Respondent at Maxwell-Gunter Air Force Base, was hired to perform quality control work at a rate of $10.00 per hour. (RX-K; CX-12).

2. The contractual conformed rate for quality control was $10.25 per hour. (CX-3 and 5).

3. Respondent failed to pay Mr. Jones the required minimum wage rate. Therefore, Mr. Jones is due the sum of $190.00 as a result of Respondent's violations. (CX-10 and 15).

Angela Smith

1. Ms. Smith was hired by Respondent under the Maxwell contract as a desk clerk at a rate of $4.00 per hour. (CX-15).

2. The contractual conformed rate for a desk clerk was $5.00 per hour. (CX-4).

3. Respondent failed to pay Ms. Smith the required minimum wage rate. Therefore, Ms. Smith is due the sum of $955.48 as a result of Respondent's violations.
(CX-15).

Julie Tatum

1. Ms. Tatum was hired by Respondent under the Maxwell contract as a desk clerk at a rate of $4.00 per hour. (CX-15).

2. The contractual conformed rate for a desk clerk was $5.00 per hour. (CX-4).

3. Respondent failed to pay Ms. Tatum the required minimum wage rate. Therefore, Ms. Tatum is due the sum of $905.86 as a result of Respondent's violations.
(CX-15).

Christine Chodnicki

1. According to Respondent's records, Ms. Chodnicki was hired under the Maxwell contract as a desk clerk at the rate of $5.00 per hour. (RX-A). However, upon applying for a job, Ms. Chodnicki specifically applied for the position of service call clerk. She was told by

Charlie Clark that service call clerk was the title of the position for which she was hired. (TR. 89).

2. Ms. Chodnicki's description of the work she performed supports the Court's conclusion that her duties were those of a service call clerk, rather that a desk clerk. She was trained by John Davis, who was initially employed as a service call clerk. (TR. 89-90). Her responsibilities involved taking the telephonic requests for maintenance, completing the work orders and assigning the work orders to the maintenance men. (TR. 89-91).

3. The contractual conformed rate for service call clerk was $7.06 per hour. (CX-6).

4. As a result of Respondent's misclassification of Ms. Chodnicki, she is due the sum of $2,224.80, representing wages for work as a service call clerk. (CX-15).

D. and O. at 15-17.

Respondent has argued that although initially conformed under the contract, each classification subsequently changed with the assignment of new and supposedly lesser experienced employees. To implement this adjustment, Respondent notified the contracting agency of each

new employee's assignment and a decreased wage rate.

The agency notified Respondent that the conformed wage rates did not change unless the duties of the position classification changed. Respondent apparently elected to ignore the agency's repeated rejection of his attempts to lower wage rates already established for specific conformed position classifications, and in each case paid the new position holder less than the conformed rate for the job classification.

Citing for authority, White Glove, Inc. v. Brennan, 518 F.2d 1271 (9th Cir. 1975), Respondent argued that he had testified without rebuttal that when this question came up in connection with a previous contract in Illinois that the objection was abandoned by the

government, and that the ALJ had "improperly disregarded this testimony without providing a detailed explanation." Respondent's Petition for Review at 5. Respondent's testimony evidence here, which frankly is difficult to identify in the record, is quite different from White Glove where the "rejected testimony" consisted of letter exhibits and recorded and live testimony "sufficient to establish a strong prima facie case in the absence of contradiction or impeachment," so that the ALJ's rejection there could be termed "arbitrary." 518 F.2d at 1276. A careful review of the record in this case establishes that the ALJ acted properly, not arbitrarily. His findings and conclusions are well-supported by the evidence and I adopt them on this issue. Conformed wage rates, once established,

do not fluctuate simply according to the various experience levels of employees assigned to the positions.

Finally, the ALJ found that there were no unusual circumstances present in this case to warrant Respondent's relief from the debarment sanction. He stated his conclusion as follows:

4. This Court finds that there are no unusual circumstances to warrant Respondent's relief from the debarment sanction. Respondent's violations of the Service Contract Act and the Contract Work Hours and Safety Standards Act were of a deliberate nature, as Mr. Kirchdorfer had knowledge of the Act's requirements of recordkeeping, conforming procedures and payment of the conformed minimum wage rate; (See paragraphs 20, 21 and 29); Respondent was investigated on three separate occasions relative to the Maxwell-Gunter Air Force Base Contract; (TR. 189-190); there was a lack of cooperation on the part of Mr. Kirchdorfer throughout these investigations, as shown by his failure to provide accurate bookkeeping records and his failure to respond to either of Mr. Makowsky's certified letters or his phone calls; (See paragraph 24); there were investigations by the Wage and Hour Division into alleged violations of Respondent prior to the Maxwell contract which resulted in an injunction against

the Respondent in the 1960's. Mr. Williams, one of the compliance officers, stated that the Respondent had a "considerable investigative history." (TR. 79).

D. and O. at 19.

Citing 29 C.F.R. § 4.188(a) (1985), the ALJ stated that "the violator of the Act has the burden of establishing the existence of unusual circumstances to warrant relief from the debarment sanction." D. and O. at 18. The ALJ then properly applied the promulgated guidelines, found at 29 C.F.R. § 4.188(b)(3) (i) and (ii) (1985), to determine the existence of unusual circumstances:

(3)(i) The Department of Labor has developed criteria for determining when there are unusual circumstances within the meaning of the Act. . . Thus, where the respondent's conduct in causing or permitting violations of the Service Contract Act provisions of the contract is willful, deliberate or of an aggravated nature or where the violations are a result of culpable conduct such as culpable neglect to ascertain whether practices are in violation, culpable disregard of whether they were in violation or not, or culpable failure to

comply with recordkeeping requirements (such as falsification of records), relief from the debarment sanction cannot be in order. Furthermore, relief from debarment cannot be in order where a contractor has a history of similar violations, where a contractor has repeatedly violated the provisions of the Act, or where previous violations were serious in nature. (ii) A good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance are generally prerequisites to relief. Where these prerequisites are present and none of the aggravated circumstances in the preceding paragraph exist, a variety of factors must still be considered, including whether the contractor has previously been investigated for violations of the Act, whether the contractor has committed recordkeeping violations which impeded the investigation, whether liability was dependent upon resolution of a bona fide legal issue of doubtful certainty, the contractor's efforts to ensure compliance, the nature, extent, and seriousness of any past or present violations, including the impact of violations on unpaid employees, and whether the sums due were promptly paid.

D. and O. at 18.

Respondent argues that "debarment is an excessive punishment" because "the errors are such a small part of the overall contracts," citing for support Federal

Food Service, Inc., v. Donovan, 658 F.2d 830 (1981). Respondent's Petition for Review at 26.

In Federal Food Service, Inc., the ALJ had placed his finding of improper management solely on the basis of "virtually 'de minimus' underpayments." That is not the case here. Here the ALJ concluded that the violation resulted from deliberate actions of the Respondent. At the least, I find that the violations were the result of Respondent's culpable neglect to ascertain whether his practices were in violation of the Act and his culpable disregard of whether they were in violation. Accordingly, I adopt the conclusion of the ALJ that unusual circumstances are not present which would warrant relief from the debarment sanction.

In his argument, Respondent alleged the existence of two "bona fide legal issues of doubtful certainty" as follows:

> Most significantly, however, is the existence of two bona fide legal issues of doubtful certainty: to what extent is an initial conformance rate imposable upon subsequent interested parties under 29 C.F.R. § 4.6(b); and what objective standards do the regulations provide by which an employer may ascertain when an employee of a former contractor is not a continuous employee.

Respondent's Petition for Review at 25.

Respondent is required to pay the approved rate to every employee in a conformed job classification in accordance with the provisions of 29 C.F.R. § 4.6(b) (2) (1983).[5] This obligation was repeatedly confirmed to Respondent by representatives of the Department of Labor and the contracting agency, whose testimony at the hearing

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[5] Part 4 of 29 C.F.R. was amended, effective December 27, 1983. 48 Fed. Reg. 49,762 (1983).

was unrefuted. Respondent does not have the option of unilaterally adopting lower rates for classifications which have already been incorporated into a wage determination, and then ignoring payment to employees by claiming disagreement with an alleged "legal issue."

The record does not reflect that Respondent intended to establish new position classifications; only to lower the rates for existing classifications. When Respondent was told he could not do so, there is no evidence he challenged the agency's response. He only continued to pay the lower rates. T. at 179. If an employer could avoid or defer proper payment to employees simply by alleging a "legal disagreement" with the contracting agency, after it was discovered that employees were being paid less than was required by the wage determination, there

could not be adequate enforcement of the Act. An employer who adopts such a course to circumvent the regulations has violated the Act. As the ALJ has ruled, such conduct is willful or "deliberate". At the least, it evidences culpable disregard of whether or not Respondent was in violation of the Act.

Neither can Respondent's argument that there was a bona fide legal issue of doubtful certainty as to the determination of who is a continuous employee under a successor contract withstand scrutiny. This was not so much a legal question, as examined by the ALJ, as it was a question of whether Respondent's testimony on the employment history of the respective employees was credible. The ALJ did not find it so, and the record supports his conclusion that "the alleged break in service was no

more than a 'temporary layoff,'" and, consequently, that there was no break in continuous service for calculating vacation payment. D. and O. at 9.

Thus, neither claim represents a bona fide legal issue of doubtful certainty. Respondent has the burden for complying with the Act, and responsibility for his failure to do so cannot be shifted to the Government. Here, as in United States v. Powers Building Maintenance Co., 336 F. Supp. 819, 822 (W.D. Okla. 1972), the ALJ

> was required to choose between conflicting versions of the true situation. The credibility of witnesses relied upon by the Hearing Examiner in arriving at his findings is his exclusive function, and his findings can be overruled only where, on the basis of the record, they were clearly incorrect.

In this case there also is evidence of culpable failure to maintain proper records, in particular for overtime pay purposes. See supra at 4-7; D. and O. at 6-7.

Respondent did not promptly repay his employees and the record supports the ALJ's findings that Respondent failed to cooperate in the investigation.

Respondent did not return telephone calls nor respond to letters from the Department of Labor. T. at 233. The record provides no evidence of Respondent's assurances of future compliance. Thus, Respondent has failed to carry his burden of establishing the existence of unusual circumstances as contemplated by the Act and the guidelines at 29 C.F.R. § 4.188(a) (3) (i) and (ii).

I find that the ALJ's decision regarding the substantive violations was correct and I AFFIRM his order that Respondent pay to the Employment Standards Administration $15,135.54, representing underpayment to employees,

plus the interest which has accrued on the wages and vacation benefits. The United States Air Force should release all monies currently withheld from Respondent for this purpose.

I also ADOPT the ALJ's recommended finding that there are no unusual circumstances to justify relief for Respondent from being placed on the list of ineligible bidders, pursuant to Section 5(a) of the Act. The Comptroller General shall be notified accordingly.

SO ORDERED.

Dennis E. Whitfield
Deputy Secretary of Labor

Washington, D.C.

5 U.S.C. § 706:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall - -

* * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be - -

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

* * *

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute.

* * *

41 U.S.C. § 352:

Violations

(a) Liability of responsible party; withholding payments due on contract; payment of underpaid employees from withheld payments

Any violation of any of the contract stipulations required by section 351(a)(1) or (2) or of section 351(b) of this title shall render the party responsible therefore liable for a sum equal to the amount of any deductions, rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of such contract.

(b) Enforcement of section

In accordance with regulations prescribed pursuant to section 353 of this title, the Federal agency head or the Secretary is hereby authorized to carry out the provisions of this section.

41 U.S.C. § 354:

List of violators; prohibition of contract award to firms appearing on list; actions to recover underpayments; payment of sums recovered

(a) The Comptroller General is directed to distribute a list to all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary have found to have violated this chapter. Unless the Secretary otherwise recommends because of unusual circumstances, no contract of the United States shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until three years have elapsed from the date of publication of the list containing the name of such persons or firms.

* * *

29 C.F.R. § 4.6:

Labor standards clauses for Federal service contracts exceeding $2,500. (1982)

* * *

(b)(1) Each service employee employed in the performance of this contract by the contractor or any subcontractor shall be paid not less than the minimum monetary wage and shall be furnished fringe benefits in accordance with the wages and fringe benefits determined by the Secretary of Labor or his authorized representative, as specified in any attachment to this contract.

(2) If there is such an attachment, any class of service employees which is not listed therein, but which is to be employed under this contract, shall be classified by the contractor so as to provide a reasonable relationship between such classifications and those listed in the attachment, and shall be paid such monetary wages and furnished such fringe benefits as are determined by agreement of the interested parties, who shall be deemed to be the contracting agency, the contractor, and the employees who will perform on the contract or their representatives. If the interested parties do not agree on a classification or reclassification which is, in fact, conformable, the contracting officer shall submit the question, together with his recommendation, to the Office

of Government Contract Wage Standards, Wage and Hour Division, ESA, of the Department of Labor for final determination. Failure to pay such employees the compensation agreed upon by the interested parties or finally determined by the Administrator is his authorized representative shall be a violation of this contract.

* * *

(k)(1) If there is a wage determination attached to this contract and one or more classes of service employees which are not listed thereon are to be employed under the contract, the contractor shall report to the contracting officer the monetary wages to be paid and the fringe benefits to be provided each such class of service employee. Such report shall be made promptly as soon as such compensation has been determined as provided in the clause in paragraph (b) of this section.

29 C.F.R. § 4.171:

Meeting requirements for particular fringe benefits. (1982)

* * *

(b)(2) Some questions have been raised about the application of provisions appearing in some fringe benefit determinations which call for "1 week paid vacation after 1 year of service with a contractor or successor." To determine when an employee meets the "after 1 year of service" test, an employer must take two factors into consideration: (i) the total length of time an employee has been in the employer's service, including both the time he has been performing on regular commercial work and the time he has been performing on the Government contract itself, and (ii) the total length of time an employee has been employed either by the present contractor or predecessor contractors in the performance of similar work on the same base.

* * *

(b)(3) Where, however, a fringe benefit determination requires 1 week's paid vacation per year after 1 year's service with an employer, no employee, temporary or permanent, with less than 1 year's service with the contractor, whether or not he was working on the contract, would qualify for this benefit.

29 C.F.R. § 4.173:

Meeting Requirements for Vacation Fringe Benefits. (1988).

(b) Eligibility requirement - continuous service.

* * *

Service must have been rendered continuously for a period of not less than one year for vacation eligibility. The term "continuous service" does not require the combination of two entirely separate periods of employment. Whether or not there is a break in the continuity of service so as to make an employee ineligible for a vacation benefit is dependent upon all the facts in the particular case. No fixed time period has been established for determining whether an employee has a break in service.

* * *

29 C.F.R. § 4.187:

Recovery of underpayments. (1988).

(a) The Act, in section 3(a), provides that any violations of any of the contract stipulations required by sections 2(a)(1), 2(a)(2), or 2(b) of the Act, shall render the party responsible liable for the amount of any deductions, rebates, refunds, or underpayments (which includes non-payment) of compensation due to any employee engaged in the performance of the contract. So much of the accrued payments due either on the contract or on any other contract (whether subject to the Service Contract Act or not) between the same contractor and the Government may be withheld in a deposit fund as is necessary to pay the employees. In the case of requirements-type contracts, it is the contracting agency, and not the using agencies, which has the responsibility for complying with a withholding request by the Secretary or authorized representative. The Act further provides that on order of the Secretary (or authorized representatives), any compensation which the head of the Federal agency or the Secretary has found to be due shall be paid directly to the underpaid employees from any accrued payments withheld.

* * *

29 C.F.R. § 4.173:

Meeting Requirements for Vacation Fringe Benefits. (1988).

(b) Eligibility requirement - continuous service.

* * *

Service must have been rendered continuously for a period of not less than one year for vacation eligibility. The term "continuous service" does not require the combination of two entirely separate periods of employment. Whether or not there is a break in the continuity of service so as to make an employee ineligible for a vacation benefit is dependent upon all the facts in the particular case. No fixed time period has been established for determining whether an employee has a break in service.

* * *

29 C.F.R. § 4.187:

Recovery of underpayments. (1988).

(a) The Act, in section 3(a), provides that any violations of any of the contract stipulations required by sections 2(a)(1), 2(a)(2), or 2(b) of the Act, shall render the party responsible liable for the amount of any deductions, rebates, refunds, or underpayments (which includes non-payment) of compensation due to any employee engaged in the performance of the contract. So much of the accrued payments due either on the contract or on any other contract (whether subject to the Service Contract Act or not) between the same contractor and the Government may be withheld in a deposit fund as is necessary to pay the employees. In the case of requirements-type contracts, it is the contracting agency, and not the using agencies, which has the responsibility for complying with a withholding request by the Secretary or authorized representative. The Act further provides that on order of the Secretary (or authorized representatives), any compensation which the head of the Federal agency or the Secretary has found to be due shall be paid directly to the underpaid employees from any accrued payments withheld.

* * *

29 C.F.R. § 4.188:

Ineligibility for further contracts when violations occur. (1988).

(a) Section 5 of the Act provides that any person or firm found by the Secretary or the Federal agencies to have violated the Act shall be declared ineligible to receive further Federal contracts unless the Secretary recommends otherwise because of unusual circumstances.

* * *

No contract of the United States or the District of Columbia (whether or not subject to the Act) shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until 3 years have elapsed from the date of publication of the list containing the names of such persons or firms.

* * *

(b)(1) The term "unusual circumstances" is not defined in the Act. Accordingly, the determination must be made on a case-by-case basis in accordance with the particular facts present.

* * *

(3)(i) The Department of Labor has developed criteria for determining when there are unusual circumstances within the meaning of the Act.

* * *

Where the respondent's conduct in causing or permitting violations of the Service Contract Act provisions of the contract is willful, deliberate or of an aggravated nature or where the violations are a result of culpable conduct such as culpable neglect to ascertain whether practices are in violation, culpable disregard of whether they were in violation or not, or culpable failure to comply with recordkeeping requirements (such as falsification of records), relief from the debarment sanction cannot be in order. Furthermore, relief from debarment cannot be in order where a contractor has a history of similar violations, where a contractor has repeatedly violated the provisions of the Act, or where previous violations were serious in nature.

(ii) A good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance are generally prerequisites to relief. Where these prerequisites are present and none of the aggravated circumstances in the preceding paragraph exist, a variety of factors must still be considered, including whether the contractor has previously been investigated for violations of the Act, whether the contractor has committed recordkeeping violations which impeded the investigation, whether liability was dependent upon resolution of a bona fide legal issue of doubtful certainty, the contractor's efforts to ensure compliance, the nature, extent, and seriousness of any past or present violations, including the

impact of violations on unpaid employees, and whether the sums due were promptly paid.

(4) A contractor has an affirmative obligation to ensure that its pay practices are in compliance with the Act, and cannot itself resolve questions which arise, but rather must seek advice from the Department of Labor.

* * *

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AUG 10 1990
JOSEPH F. SPANIOL, JR.
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No. 89-1938

In the Supreme Court of the United States

OCTOBER TERM, 1990

JOSEPH C. KIRCHDORFER, ET AL., PETITIONERS

v.

SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Deputy Secretary of Labor properly determined that a contractor violated the Service Contract Act and should be barred from contracting with the federal government for a period of three years.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulations:

Statutes and regulations—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) [1] is unreported. The district court's order (Pet. App. B1-B2) and the final memorandum decision (Pet. App. C1-C14) are unreported. The memorandum decision of the district court (App., *infra*, 1a-7a) denying a preliminary injunc-

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[1] Petitioner's appendix contains (1) the court of appeals' decision, (2) the district court's order, (3) the district court's decision, (4) the Deputy Secretary of Labor's decision, and (5) pertinent statutes and regulations. We will refer to these decisions with pagination designations of A, B, C, D, and E, respectively. The district court's memorandum decision denying a preliminary injunction and the administrative law judge's decision are reproduced as an appendix to this brief.

tion is unreported. The final decision and order of the Deputy Secretary of Labor (Pet. App. D1-D34) is unreported. The decision and order of the administrative law judge (App., *infra*, 8a-34a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1990. The petition for a writ of certiorari was filed on May 17, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(a).

STATEMENT

1. The McNamara-O'Hara Service Contract Act of 1965 (SCA or the Act), 41 U.S.C. 351 *et seq.*, applies to those contracts between the United States and contractors "the principal purpose of which is to furnish services in the United States through the use of service employees." 41 U.S.C. 351(a). The Act requires each such contract in excess of $2500 to include provisions specifying the minimum wage and fringe benefits to be paid the various classes of service employees in the performance of the contract or any subcontract. 41 U.S.C. 351(a)(1) and (2). The Secretary of Labor determines the contract wage and fringe benefits based on the prevailing rate for such employees in the locality or, where applicable, in accordance with the rates provided in a collective bargaining agreement. *Ibid.* In general, a service contract providing substantially the same services as a predecessor contract must provide at least the same wages and fringe benefits as the predecessor contract, including payment of any accrued wages or fringe benefits. 41 U.S.C. 353(c). A party responsible for a violation of the Act is liable for the amount of the underpayment, and is also subject upon

written notice to cancellation of the contract by the contracting agency. 41 U.S.C. 352(a) and (c). In addition, the Act directs that, "[u]nless the Secretary otherwise recommends because of unusual circumstances," any person or firm found to have violated the Act shall be included on a list distributed by the Comptroller General and rendered ineligible for any federal contract for three years from the date of publication on the list. 41 U.S.C. 354(a).

The Secretary administers the SCA (41 U.S.C. 353(a)), and has issued regulations implementing the Act. 29 C.F.R. Pt. 4. One of these regulations sets forth criteria for evaluating the "unusual circumstances" exception to the debarment sanction. 29 C.F.R. 4.188. The regulation provides that a violator of the Act has the burden of establishing sufficient unusual circumstances to justify the exception. 29 C.F.R. 4.188(b)(1). It enumerates certain types of violations for which the "unusual circumstances" exception is unavailable—those in which the violation is "willful, deliberate or of an aggravated nature or where the violations are a result of culpable conduct such as culpable neglect to ascertain whether practices are in violation, culpable disregard of whether they were in violation or not, or culpable failure to comply with recordkeeping requirements" (29 C.F.R. 4.188(b)(3)(i)); it also sets forth certain "prerequisities" to the exception (such as a "good compliance history, cooperation in the investigation * * * and sufficient assurances of future compliance"), but notes that the presence of these factors and the absence of aggravating circumstances must still be evaluated in the context of other factors to determine if the exception is available. 29 C.F.R. 4.188(b)(3)(ii).

2. The Air Force awarded petitioner Skip Kirchdorfer, Inc. two contracts—a contract in September 1980 for the maintenance of military housing at Patrick Air Force Base in Florida, and a contract in September 1981 for the main-

tenance of military housing and appliances at Maxwell-Gunter Air Force Base in Alabama. Both contracts exceeded $2,500, referred explicitly to the SCA, and contained provisions specifying job classifications and the minimum wages and fringe benefits to be paid on the contract. The Maxwell-Gunter contract also referred to the Contract Work Hours and Safety Standards Act (CWHSSA), 40 U.S.C. 327 *et seq.*[2] App., *infra*, 10a-11a.

3. In 1983 and 1984, the Wage and Hour Division of the Department of Labor filed complaints that petitioners had violated the SCA and CWHSSA in the performance of the two contracts.[3] The Department charged petitioners with (1) the failure to pay accrued vacation benefits to one employee under the Patrick contract and three employees under the Maxwell-Gunter contract (Pet. App. D3; App., *infra*, 18a-23a); (2) the failure to pay overtime to two air conditioning mechanics under the Maxwell-Gunter contract (Pet. App. D6-D11; App., *infra*, 23a-25a); (3) the payment of six employees at rates below the wage determinations established for their job classifications under the Maxwell-Gunter contract (Pet. App. D14-D25; App., *infra*, 26a-30a); and (4) the misclassification of a quality control worker as a supply clerk under the Maxwell-

---

[2] The CWHSSA applies to contracts involving the employment of laborers or mechanics for or on behalf of the United States; it sets forty-hour workweek and overtime requirements. 40 U.S.C. 328.

[3] The Wage and Hour Division is the organizational unit within the Department of Labor to which the Secretary has assigned the performance of her functions under the SCA. 29 C.F.R. 4.1a(c). Although the complaint was filed against the single entity of "Joseph C. Kirchdorfer d/b/a Skip Kirchdorfer, Inc.," we will adhere to petitioners' litigation caption and refer to the individual and his company in the plural.

Gunter contract (Pet. App. D11-D13; App., *infra*, 30a-31a).

4. After an evidentiary hearing, the administrative law judge ruled against petitioners in all respects. First, the ALJ found that the one Patrick employee and the three Maxwell-Gunter employees were entitled to accrued vacation pay as "continuous" employees from the predecessor contracts. App., *infra*, 18a-19a. Second, the ALJ found that, contrary to petitioners' "grossly inaccurate" payroll records (*id.* at 24a), the two air conditioning mechanics consistently worked well in excess of 40 hours per week and were thus entitled to overtime pay in accordance with the Wage and Hour investigator's calculations. *Id.* at 23a-25a. Third, the ALJ found that petitioners had failed to pay six employees the contract minimum wage specified for their job classifications in violation of the SCA, the contract, and applicable regulations (App., *infra*, 26a); the ALJ also noted that petitioner Joseph Kirchdorfer had been advised of the applicable requirements "on numerous occasions" (*id.* at 27a). Fourth, the ALJ found that, in addition to his work as a supply clerk, one employee performed quality control work at least 25% of the time and was consequently entitled to additional compensation for this misclassification. *Id.* at 30a-31a.

In all, the ALJ determined that petitioners owed 13 employees a total of $15,135.54, plus interest, under the SCA and CWHSSA. App., *infra*, 33a-34a. Furthermore, the ALJ recommended the debarment of petitioners in accordance with Section 5(a) of the SCA, 41 U.S.C. 354(a). App., *infra*, 31a-33a. Applying the statutory and regulatory criteria, the ALJ found that there were "no unusual circumstances to warrant [petitioners'] relief from the debarment sanction." *Id.* at 32a. To the contrary, the ALJ found that the violations were of "a deliberate

nature"; that petitioner Joseph Kirchdorfer "had knowledge" of the relevant statutory requirements; that he had not cooperated with the Wage and Hour investigations; and that he had previously been enjoined for labor standards violations. *Id.* at 32a-33a.

5. On review, the Deputy Secretary, who issues final administrative determinations under the SCA in the absence of a Board of Service Contract Appeals (see 29 C.F.R. 8.0), affirmed. The Deputy Secretary adopted the ALJ's findings and conclusions, which he held were well supported by the evidence, based in large measure on credibility determinations for which the ALJ was uniquely qualified, and in accordance with the law. Pet. App. D6, D13, D24. The Deputy Secretary agreed that no "unusual circumstances" existed to warrant relief from debarment because "the violations were the result of [petitioners'] culpable neglect to ascertain whether [their] practices were in violation of the Act and [their] culpable disregard of whether they were in violation." *Id.* at D28. In rejecting petitioners' claim that the vacation pay and job classification issues represented "bona fide legal issues of doubtful certainty," the Deputy Secretary explained that the classification obligation had been "repeatedly confirmed" to them by the Labor Department and the contracting agency (*id.* at D29), and that the vacation pay issue turned on a credibility determination, which the ALJ had resolved against petitioners (*id.* at D31-D32). The Deputy Secretary also found "evidence of culpable failure to maintain proper records, in particular for overtime pay purposes" (*id.* at D32), "fail[ure] to cooperate in the investigation" (*id.* at D33), and "no evidence of [petitioners'] assurances of future compliance." *Ibid.*

Petitioners then sought review in the district court. They contended that the ALJ's decision was based on insufficient evidence and on improper interpretations of the ap-

plicable regulations. Pet. App. C2-C3. The district court granted the Secretary's motion for summary judgment, holding that the ALJ's factual findings were supported by the evidence in the record, and that the legal conclusions were based on reasonable interpretations of the applicable regulations. *Id.* at C7-C12. The court also rejected petitioners' arguments concerning the existence of unusual circumstances to warrant relief from the debarment sanction (*id.* at C13); it determined that "there was more than a preponderance of the evidence to support [the ALJ's and Deputy Secretary's] findings that [petitioners'] violations were of an aggravated nature, and did not constitute a good faith attempt to comply with the Act." App., *infra*, 5a.

7. In an unpublished per curiam decision, the court of appeals affirmed. It relied on the reasoning set out by the district court in its decisions denying a preliminary injunction and granting the Secretary's motion for summary judgment. Pet. App. A1-A3.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, no further review is warranted.

1. Petitioners' principal contention (Pet. 12-13, 17) is that the court of appeals' decision conflicts with *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128 (1988), but they do not elaborate the basis for their claim. The argument appears to be that *Richland Shoe* requires knowledge of a statutory violation or reckless disregard of a statutory prohibition to establish a "willful" violation; here, petitioners submit (Pet. 12), there was a "good faith effort to comply with the requirements of 29 C.F.R. § 4.171(b)(2) (1982) [*sic*] establishing wage rates for

employees in ~~job~~ classifications not identified on Respondent's prevailing wage lists," and thus petitioners should not have been placed on the debarment list.[4]

This contention is incorrect in several respects. Most basically, the decision below cannot be in conflict with *Richland Shoe* because *Richland Shoe* is wholly inapposite. *Richland Shoe* construed the Fair Labor Standards Act, which imposes a two-year statute of limitations for ordinary violations and a three-year statute of limitations for "willful" violations. 29 U.S.C. 255(a); 486 U.S. at 129. The SCA lacks a comparable statute of limitations.[5] Indeed, the SCA itself draws no distinction between ordinary violations and willful violations, either in the debarment provision or in any other provision. See 41 U.S.C. 352(a), 354(a).

In the SCA context, relief from the debarment requirement is intended to be exceptional. While in the FLSA "Congress intended to draw a significant distinction be-

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[4] Petitioners mistakenly cite 29 C.F.R. 4.171(b)(2) and refer to "wage rates for employees in job classifications." Pet. 12. In fact, the cited regulation relates to the continuous employment requirement for vacation pay (see App., *infra*, 12a); the regulation concerning job classification for which petitioners were cited was 29 C.F.R. 4.6(b)(2). Pet. App. C11; App., *infra*, 26a.

[5] The source of the FLSA statute of limitations is the Portal-to-Portal Act of 1947, 29 U.S.C. 216, 251-262, as amended in 1966 (Pub. L. No. 89-601, § 601(a) 80 Stat. 844). *Richland Shoe*, 486 U.S. at 131-132. As noted in *Richland Shoe* (*id.* at 131), the statute construed in that case also applies to the Equal Pay Act of 1963 (29 U.S.C. 206(d)(3)), the Davis-Bacon Act (40 U.S.C. 276a to 276a-5), the Walsh-Healey Act (41 U.S.C. 35-45), and the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(e)(1)). The Portal-to-Portal Act of 1947, however, does not apply to either the SCA or the CWHSSA. See *United States* v. *Deluxe Cleaners & Laundry, Inc.*, 511 F.2d 926, 928-929 (4th Cir. 1975). Cf. *Glenn Elec. Co.* v. *Donovan*, 755 F.2d 1028, 1031-1033 (3d Cir. 1985) (Federal Housing Act).

tween ordinary violations and willful violations" (486 U.S. at 132), the statutory language of the SCA clearly establishes that debarment is the required sanction in all but "unusual circumstances." 41 U.S.C. 354(a). And the legislative history leaves no doubt about the intended rarity of the exception. Congress amended the Act to include the "because of unusual circumstances" language in 1972. Act of Oct. 9, 1972, Pub. L. No. 92-473, § 4, 86 Stat. 790. The Senate Report accompanying the amendment states that the debarment provision "imposes upon the Secretary *the duty*, where he does not otherwise recommend because of unusual circumstances, to forward to the Comptroller General the name of the individual or firm found to have violated the provisions of the act, within 90 days after a hearing examiner has made a finding of violation." S. Rep. No. 1131, 92d Cong., 2d Sess. 4 (1972) (emphasis added). The explicit purpose of the amendment was to circumscribe the Secretary's discretion to afford relief from debarment. See *id.* at 3-4; H.R. Rep. No. 1251, 92d Cong., 2d Sess. 5 (1972); 29 C.F.R. 4.188(b)(1).

In this case, moreover, as the district court and the court of appeals held, the Deputy Director's determination that petitioner had not established "unusual circumstances" was entirely reasonable. The Deputy Director properly found, based on the evidence in the record, that petitioner had engaged in "culpable neglect," "culpable disregard," and "culpable failure to maintain proper records," as well as a failure to "cooperate in the investigation" and to provide "assurances of future compliance." Pet. App. D27-D28, D31-D33. Under the terms of the Secretary's regulation, such a contractor is plainly not entitled to "unusual circumstances" relief from the usual debarment sanction.

2. Petitioners further contend (Pet. 13-15) that the court of appeals' decision conflicts with *Anderson* v. *Mt.*

Clemens Pottery Co., 328 U.S. 680 (1946). Petitioners claim that the Secretary failed to introduce into evidence the "service call cards," that these cards were the most accurate record of time worked by employees, and that the Secretary thus failed to carry the burden suggested by *Mt. Clemens Pottery*. This contention, which relates only to the overtime violations, is also incorrect. The Secretary clearly carried her burden by introducing credible and probative evidence of the time worked by the two air conditioning mechanics (Pet. App. C7, C10-C11, D6-D11, D13-D14; App., *infra*, 17a, 23a-25a); the decisions below thus are fully consistent with *Mt. Clemens Pottery*. The records used by petitioners to calculate hours worked, in contrast, were found to be "grossly inaccurate." App., *infra*, 24a. Although petitioners now attempt to rely on the service call cards, they failed to introduce the cards at the administrative hearing. *Id.* at 16a. Instead, they "provided no substantiation of the actual hours [they] claimed the employees had worked" (Pet. App. D11), and the ALJ properly determined that the Secretary's evidence was probative and sufficient.[6]

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[6] Petitioners' final contentions are that the ALJ "relied on alleged facts outside of the administrative record" (Pet. 15) and that "certain assessments" against petitioners were based on "a total absence of evidence" (Pet. 16). Petitioners do not indicate the "alleged facts" to which they are referring; to the extent that the reference is to the ALJ's post-hearing acceptance of documentary evidence regarding the vacation pay issue, the district court correctly rejected petitioners' claim of error (Pet. App. C8-C10). Petitioners also do not specify the basis for the claim of "a total absence of evidence"; it is clear that the ALJ's findings were supported by the evidence and that the adjudicative proceeding was conducted in full accord with the law and applicable regulations. See, *e.g.*, Pet. App. C6-C11; *id.* at D5-D6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1990

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE

No. C 88-0771-L(B)

JOSEPH C. KIRCHDORFER, ET AL., PLAINTIFF

v.

ANN MCLAUGHLIN, IN HER CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, DEFENDANT

MEMORANDUM AND ORDER

This matter is before the Court on the motion of plaintiffs, Joseph C. Kirchdorfer and Skip Kirchdorfer, Inc. (collectively "Kirchdorfer"), for preliminary injunctive relief.[1] Kirchdorfer is in the business of supplying military housing maintenance services under contracts which are subject to the Service Contract Act of 1965 (the "Act"), as amended, Title 41 U.S.C. § 351, *et seq*. In 1980 and 1981, Kirchdorfer was awarded two maintenance contracts; the first for maintenance of military housing at Patrick Air

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[1] Kirchdorfer and the defendant, Ann McLaughlin, in her capacity as Secretary of the U.S. Department of Labor, have each also filed motions for summary judgment. Disposition of these motions will be reserved pending expiration of the time for filing responses and replies provided for in L.R. 6(b)(1).

Force Base in Florida, and the second for maintenance of family housing and appliances at Maxwell Air Force Base and Gunter Air Force Base in Alabama.

An administrative complaint was filed with the United States Department of Labor ("DOL") on August 26, 1983 and later amended charging Kirchdorfer with violations of the vacation fringe benefits and minimum and overtime wage provisions of the Act. A formal hearing was held before an administrative law judge on March 3, 1986. On November 28, 1986, the administrative law judge entered his decision and order finding that Kirchdorfer had violated the Act in the performance of his two contracts. Specifically, Kirchdorfer had failed to pay four employees vacation benefits to which they were entitled, failed to pay overtime wages to two employees, failed to pay one employee at the appropriate wage rate for the classification of work he performed, and unilaterally lowered the conformed wage rate for six new employees.

Kirchdorfer was ordered to pay $15,135.54 plus interest to these employees for wages and vacation benefits due as a result of his violations of the Act. The administrative law judge also found that Kirchdorfer had not established any "unusual circumstances" to warrant relief from the debarment sanction provided for in the Act.[2] Accordingly, the

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[2] Title 41 U.S.C. § 354(a) provides in part that:

> The Comptroller General is directed to distribute a list to all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary have found to have violated this chapter. Unless the Secretary otherwise recommends because of unusual circumstances, no contract of the United States shall be awarded to the persons of firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until three years have elapsed from the date of publication of the list containing the name of such persons or firms. . . .

administrative law judge recommended, pursuant to 29 C.F.R. § 6.19(b)(2), that the Secretary of Labor take no action to remove Kirchdorfer from the list of those individuals and companies ineligible to bid for government contracts.

Kirchdorfer filed a petition for review with the DOL pursuant to 29 C.F.R. § 6.20. In a final decision and order dated September 28, 1988, the DOL's Deputy Secretary affirmed the findings and conclusions of the administrative law judge, including the determination that there were no unusual circumstances to justify relief for Kirchdorfer from placement on the list of bidders ineligible for government contracts. DOL notified the Comptroller General and Kirchdorfer's name was placed on the ineligible bidders list effective November 28, 1988.

Kirchdorfer now seeks a preliminary injunction ordering the DOL to withdraw his name from the list of bidders ineligible for government contracts pending review by this Court of the DOL's final administrative action. Kirchdorfer argues that the administrative findings were not supported by substantial evidence and that the action of DOL's Deputy Secretary in refusing to remove Kirchdorfer's name from the debarment list was arbitrary, capricious, an abuse of discretion and contrary to procedural regulations.

In order to succeed on his motion for preliminary injunctive relief, Kirchdorfer must demonstrate a substantial likelihood for success on the merits, that without such relief he will suffer irreparable harm, that the issuance of the injunction will not substantially harm other interested parties, and that the granting of such relief is in the public interest, or at least is not contrary to that interest. *In re DeLorean Motor Co.*, 755 F.2d 1223 (6th Cir. 1985); *Barton v. Bergland*, 444 F.Supp. 447 (E.D. Ky. 1978). These four considerations are factors to be balanced, and not

prerequisites which must be met. *In re DeLorean*, 755 F.2d at 1229.

Kirchdorfer argues (i) that he made a good faith attempt to comply with the terms of the Act, (ii) that his violations with respect to vacation benefits for continuous employees and conformed wage classifications for new employees were the result of a legal dispute regarding the reasonable interpretation and application of the applicable statutes and regulations, and, (iii) that his violations, if any, were *de minimis* given the size of his contracts.

Title 41 U.S.C. § 39, incorporated by Title 41 U.S.C. § 353(a) of the Act, delegates to DOL's Secretary the power to conduct hearings to enforce the Act and provides that its findings ". . . if supported by the preponderance of the evidence, shall be conclusive in any court of the United States." The application of the debarment sanction of Title 41 U.S.C. § 354(a) is governed by the regulations at 29 C.F.R. § 4.188. The regulations indicate that amendments made to the Act in 1972 effectively limit the discretion of DOL's Secretary to relieve violators from the debarred list, and that "the violator of the Act has the burden of establishing the existence of unusual circumstances to warrant relief from the debarment sanction." 29 C.F.R. § 4.188(b)(1). Further, the regulations set out the criteria developed by the DOL for determining when there are unusual circumstances within the meaning of the Act. 29 C.F.R. § 4.188(3)(i) and (ii).

Under the regulatory criteria, Kirchdorfer first had to show that no aggravated circumstances exist. 29 C.F.R. § 4.188(3)(i). Both the administrative law judge and DOL's Deputy Secretary carefully considered whether Kirchdorfer demonstrated unusual circumstances. They found that Kirchdorfer knew of the Act's recordkeeping requirements, yet instructed two employees not to keep accurate time cards because they would not be paid overtime

for any hours worked in excess of forty hours per week. Kirchdorfer also knew of the Act's conforming procedures and its requirement that he pay the conformed minimum wage rate for established job classifications, yet he ignored the DOL's repeated rejection of his unilateral attempt to lower wage rates already established for specific position classifications.

The administrative law judge found Kirchdorfer's violations of the Act to be deliberate. The Deputy Secretary concluded that, at a minimum, Kirchdorfer's violations were the result of his culpable disregard of whether his practices were in violation of the Act. This Court is satisfied that there was more than a preponderance of the evidence to support their findings that Kirchdorfer's violations were of an aggravated nature, and did not constitute a good faith attempt to comply with the Act.

Moreover, Kirchdorfer does not meet any of the additional criteria set forth in 29 C.F.R. § 4.188(3)(ii) which are generally prerequisites to relief from debarment. He has been investigated for noncompliance several times, and was uncooperative during the course of the underlying investigation in this matter by his failure to answer correspondence or return telephone calls to DOL's compliance officer. Not surprisingly, there is no evidence in the record to indicate that Kirchdorfer has repaid the money owed his employees since he is contesting his liability for these amounts, nor has Kirchdorfer given any assurances of future compliance.

As this Court reads the regulatory criteria, because Kirchdorfer failed to prove the nonexistence of the aggravated circumstances in 29 C.F.R. § 4.188(3)(i) or that the general prerequisites of 29 C.F.R. § 4.188(3)(ii) were satisfied, consideration need not be given to the third part of DOL's test including, among other things, whether Kirchdorfer's liability was dependent upon resolution of a

bona fide legal issue of doubtful certainty. 29 C.F.R. § 4.188(3)(ii).

Finally, Kirchdorfer argues that his violations are *de minimis* given the total dollar amount of his contracts and the large number of workers he employs. In some instances, *de minimis* underpayments may warrant relief from the harsh penalty of debarment. *See Federal Food Service, Inc. v. Donovan*, 658 F.2d 830 (D.D.C. 1981). In this case, however, the amount of Kirchdorfer's underpayments alone cannot counterbalance the fact that more factors weigh unfavorably against him, including his refusal to cooperate in the investigation, the wilfullness of his violations, and his prior investigative history.

Because Kirchdorfer did not prove the unusual circumstances necessary to relieve him from the debarment sanction, the refusal of the administrative law judge and the Deputy Secretary to recommend such relief was not arbitrary, capricious or an abuse of discretion.

Finally, the remaining three factors to be considered in determining whether a preliminary injunction should be granted weigh against Kirchdorfer. Kirchdorfer simply makes the bald assertion that, if his name remains on the list of ineligible bidders pending review by this Court of the agency action, he will be forced out of business with a resulting loss of hundreds of thousands of dollars in business opportunities. There is no indication of what percentage of Kirchdorfer's business was comprised of government contracts, nor is there any indication that he would be unable to bid on non-government contracts. Kirchdorfer's ability to bid for and enter into government contracts is not a right or an entitlement and the bare fact that he will be precluded from obtaining such contracts for three years does not lead automatically to the conclusion that his inclusion on the list of ineligible bidders will cause him irreparable harm.

Finally, the harm to other interested parties and to the public interest also weigh against granting Kirchdorfer a preliminary injunction. To relieve a violator of the penalty of debarment where the sanction otherwise appears to be warranted completely undermines the intent of Congress that the sanction be strictly applied, eliminates the deterrent effect that possible debarment has on other contractors, and places contractors who comply with the Act's wage and benefits provisions at a competitive disadvantage. The Act was intended to provide fair wage standards for employees working for government contractors on federal service contracts and to set aside the imposition of a sanction which is consistent with the Act is not in the public interest absent some compelling reason to grant an injunction. *Federal Food Serv., Inc. v. Marshall*, 481 F.Supp. 816 (D.D.C. 1979). Kirchdorfer has failed to demonstrate a compelling reason which would entitle him to injunctive relief to remove his name from the list of contractors ineligible to enter into government contracts and such relief shall therefore be denied.

IT IS SO ORDERED this 1st day of March, 1989.

/s/ Thomas A. Ballantine, Jr.
THOMAS A. BALLANTINE, JR.
United States District Judge

Copies to counsel

Entered March 1, 1989

APPENDIX B

Department of Labor

Office of Administrative Law Judges
Heritage Plaza, Suite 530
111 Veterans Memorial Blvd.
Metairie, LA 70005

Case No. 83-SCA-111

IN THE MATTER OF

JOSEPH C. KIRCHDORFER d/b/a SKIP KIRCHDORFER, INC.
RESPONDENT

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Office of the Solicitor
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For The Complainant

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For the Respondent

DECISION AND ORDER

Statement of the Case

This is a proceeding under the provisions of the McNamara-O'Hara Service Contract Act (41 U.S.C. § 351, *et seq.*), hereinafter referred to as "SCA," and the

Contract Work Hours and Safety Standards Act (40 U.S.C. § 327, *et seq.*), hereinafter referred to as "CWHSSA," and the regulations issued thereunder (29 C.F.R., Parts 4 and 6).

This proceeding was initiated upon the issuance of a complaint by the Regional Solicitor of Labor (hereinafter "Complainant") and filed in the Office of Administrative Law Judges, United States Department of Labor on August 26, 1983. This complaint charged the Respondent with having failed to pay accrued vacation fringe benefits to service employees performing work pursuant to a government contract. In July of 1984 a separate complaint was filed by the Regional Solicitor against the Respondent, alleging a similar violation with respect to an employee performing work pursuant to a separate government contract.

On July 31, 1984, Complainant moved to amend the original complaint alleging the Respondent's failure to pay overtime wages, as well as failure to pay certain service employees the proper minimum wages due the employees' conformed classes. This motion was granted by Order dated September 7, 1984.

By Order dated December 17, 1984, the Complainant's Motion to Consolidate the two separate cases was granted.

On April 19, 1985, Complainant again moved to amend the original complaint, alleging Respondent's failure to pay a service employee overtime wages and failure to pay certain employees minimum wages due pursuant to the government contract. This motion was granted by Order dated June 11, 1985.

Respondent timely filed its reply to the Government's complaint. Notice of Hearing was issued, and a hearing was held in Wetumpka, Alabama on March 3, 1986, at which time the parties were afforded the opportunity to

present documentary evidence, to examine and cross-examine witnesses and to present arguments.[1]

On the basis of the entire record, the Court, makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. In September of 1980, The Air Force awarded Skip Kirchdorfer, Inc. contract number F 08650-80-Co 261 for the maintenance of military family housing at Patrick Air Force Base in Florida. (CX-1). The contract, which ran from November 1, 1980 to October 31, 1982, contained references to the SCA provisions and was in excess of $2,500.00 (CX-1; TR 20-21; 41 U.S.C. § 351 (1986)).

2. Of Complainant's alleged violations, only one employee who performed work pursuant to the Patrick Air Force Base contract is involved, Frank Krzynowek. (TR 29-30).

3. The predecessor contractor of the Patrick Air Force Base contract was Glen Allen Maintenance Company, hereinafter referred to as "Glen Allen." (TR 30).

4. Service employees performing work pursuant to the Patrick Air Force Base contract were entitled to vacation benefits as follows:

> 2 weeks paid vacation after 1 year of service with a contractor or successor. . . . Length of service includes the whole span of continuous service with the present (successor) contractor wherever employed, and with predecessor contractors in the performance

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[1] The following abbreviations will be used when referring to the evidence of record:

Transcript – TR
Complainant's Exhibits – CX
Respondent's Exhibits – RX

of similar work at the same Federal facility (Reg. 4. 171(b)(2).) CX-1.

5. In September of 1981, the Air Force awarded Skip Kirchdorfer, Inc. contract number FO1600-81-CO146 for the maintenance of military housing and appliances therein at Maxwell-Gunter Air Force Base, hereinafter referred to as "Maxwell," in Alabama. (CX-2; TR 22-23). The contract, which ran from October 1, 1981 to September 30, 1982, contained references to the SCA provisions, and was in excess of $2,500.00. (CX-2; TR 23-24). The Maxwell contract was extended through September 30, 1984. (TR 23). Also contained therein was reference to the CWHSSA. (TR 27).

6. The predecessor contractor of the Maxwell contract was Harold Bailey, hereinafter referred to as "Bailey." (TR 31).

7. The Maxwell contract contained Wage Determination number 70-75 (Rev.-16). (CX-2). This wage determination was superseded by Wage Determination 70-75 (Rev.-19) on September 6, 1983 when the Government exercised its option to extend the contract. (CX-3).

8. On May 14, 1982, Wage Determination 70-75 (Rev.-16) was amended by adding the conformed classes of "desk clerk" at the minimum wage rate of $5.00 per hour, and "service call clerk" at the minimum wage rate of $6.00 per hour. (CX-4). These classifications and hourly rates were incorporated into the Maxwell contract. (CX-4).

9. On November 24, 1981, Wage Determination 70-75 (Rev.-16) was amended by adding the conformed classes of "quality control" at the minimum wage rate of $10.25 per hour, and "chief clerk" at the minimum wage rate of $7.50 per hour. (CX-5). These classifications and hourly rates were incorporated into the Maxwell contract. (CX-5).

10. On February 24, 1984, Wage Determination 70-75 (Rev.-19) was amended by adding the conformed class of "service call clerk" at the minimum wage rate of $7.06 per hour, which class and rate were incorporated into the Maxwell contract. (CX-6).

11. Pursuant to the provisions of the Maxwell contract, service employees were entitled to vacation benefits as follows:

> 1 week paid vacation after 1 year of service with a contractor or successor; 2 weeks after 2 years; 3 weeks after 10 years. Length of service includes the whole span of continuous service with the present (successor) contractor, wherever employed, and with predecessor contractors in the performance of similar work at the same Federal facility. (Reg. 4.171(b)(2). CX 2.

12. The following provision with reference to conformed classifications and corresponding rates was included in the Maxwell contract:

> Any class of service employee employed on the contract but not listed above shall be classified by the contractor so as to provide a reasonable relationship between such classes and those listed above, and shall be paid such monetary wages and furnished such fringe benefits as are determined by agreement of the interested parties, who shall be deemed to be the contracting agency, the contractor, and the employees who will perform on the contract or their representatives. In the absence of an agreement, the question of proper conformable wage rates is to be submitted to the Department of Labor by the contracting officer for a final determination. (See Section 4.6(b) of Regulations 29 C.F.R. 4). CX 2.

13. Skip Kirchdorfer is the President and a major stockholder of Kirchdorfer, Inc., Respondent in the case at bar. Respondent was incorporated in 1964. (TR 44).

14. Respondent's payroll period has been structured to end on Tuesdays and begin on Wednesdays. (TR 217). The Respondent stated that it has operated under this payroll period structure since 1964. (TR 217).

15. Respondent asserted its company policy with reference to determining whether an employee is a "continuous employee" for purposes of vacation entitlements. According to the Respondent, if an employee of the predecessor contractor is hired within the Respondent's first payroll period of the contract, then the employee is a "continuous employee." (TR 217). At the hearing, Mr. Kirchdorfer stated that this has been company policy since 1978. (TR 217-218).

16. Applying the above descibed procedure to the contracts at issue, an employee would have to have been hired

on or before November 4, 1980 under the Patrick contract, and on or before October 6, 1981 under the Maxwell contract to be considered a "continuous employee." These dates represent the end of the first payroll period of each contract. (RX-F).

17. At the hearing, Mr. Kirchdorfer described the process of "manning" a service contract. The predecessor normally takes two to three days to move out of the location, and the successor takes several days to set up, since supplies and materials must be ordered. (TR 138, 216). Consequently, once work is actually begun on a housing maintenance contract, the Respondent is generally four to five days behind. (TR 216). Respondent further stated that, due to this delay in actual commencement of work, more employees are hired following this lag period because of the increased need which arises. (TR 216).

18. According to the testimony of Mr. Edge relative to the Maxwell contract, the vast majority of Respondent's work force was hired from the service employees working for the predecessor contractor, Bailey. (TR 136-137).

19. The testimonies of Mr. Edge and Mr. O'Donnell indicate that these two employees were led to believe they would be hired by the Respondent, though not perhaps for a number of days subsequent to the commencement of Respondent's Maxwell contract. Mr. Kirchdorfer personally visited the employees of the predecessor, Bailey, and notified them that his company would be hiring during the initial period of Respondent's contract. (TR 133-138, 142-143). The testimony of another service employee, Walter Ferguson, corroborated that of Mr. Edge and Mr. O'Donnell.

More specifically, Mr. Kirchdorfer stated to Mr. O'Donnell that the predecessor employees could remain working under Respondent's Maxwell contract, but that the employees would have to wait to begin work until the

materials had arrived. (TR 142-143). Mr. Kirchdorfer also approached Mr. Ferguson about continuing with the contract under Respondent. (TR 160). Based upon Mr. Kirchdorfer's representations, Mssrs. Ferguson, O'Donnell and Edge believed they would continue working when Respondent became contractor of the Maxwell contract.

20. On at least three occasions, Gary Williams, a compliance officer with the Wage and Hour Division, explained to and discussed with Mr. Kirchdorfer the issue of conforming rates. Mr. Williams described the procedure which must be used to conform a classification of employees and minimum wage rate. He further explained that, once the rate is agreed upon by the contractor, employee and contracting officer, it becomes part of the contract, and employees subsequently hired into this position must be paid the agreed upon rate. (TR 74, 80-83).

21. Additionally, Peggy Jolly, the contract administrator who was responsible for the Maxwell contract, personally met with Sidney Bradly and Charles Clark, both supervisory personnel of Respondent under the Maxwell contract, and explained to them the proper conformance procedures. She also advised them of the necessity of posting the conformed rates along with the wage determination. (TR 172, 179-180). As the Respondent's manager, Mr. Bradley had the full authority to act on behalf of the Respondent. (TR 187).

22. With regard to the Maxwell contract, Francis Makowsky, a compliance officer with the Wage and Hour Division since 1968, conducted a series of three investigations while Respondent was contractor. During the first audit in October of 1981, he examined alleged violations of failure to pay vacation benefits to certain employees. (TR 189-190). While conducting the second audit, Mr. Williams discovered potential violations of failure to pay overtime wages. At this time, neither basic payroll nor

basic time records were available at the Maxwell Air Force Base, as the file had been sent to the Louisville, Kentucky office to Mr. Williams for a thorough audit. As a result of Mr. Williams' audit, subsequent violations were alleged. (TR 190-191). The third investigation by Mr. Makowsky took place after the Respondent's contract had expired, and it revealed further evidence of possible misclassification of employees. (TR 192).

23. Following his review of Respondent's records, as well as personal interviews with certain employees, Mr. Makowsky computed what monies the Respondent owed to certain employees for failure to pay vacation benefits, failure to pay overtime wages and for misclassification and failure to pay the minimum wage rate which had been conformed and incorporated into the contracts. These computations are contained in Complainant's exhibits 13, 14 and 15.

24. Mr. Makowsky sent two certified letters to Mr. Kirchdorfer informing him of certain alleged violations and advising him that the file would be submitted to the Solicitor's Office for potential litigation. Mr. Kirchdorfer responded to neither of these certified letters from the compliance officer. (TR 196, 208, 232). In addition, Mr. Makowsky telephoned Mr. Kirchdorfer approximately three times in the three weeks following the mailing of the certified letters, leaving a message each time for Mr. Kirchdorfer to return his call. These calls were not returned by Mr. Kirchdorfer. (TR 307-308).

25. It was Mr. Kirchdorfer's testimony that all of the hours worked on the job site were kept by the project manager at Maxwell. The project manager then called the time in to the Respondent's office in Louisville, Kentucky at the end of each pay period. That same day, the checks were issued and mailed. Thereafter, the project manager was required to send in a payroll report for the week. This

report was checked with the amount of time that was reported by telephone. If there was a discrepancy, such as an underpayment, Mr. Kirchdorfer asserted that the employee was paid on the supplemental payroll the next week. (TR 257-258).

26. As to the employees Johnny Milham and James Rudolph, both evening air conditioning maintenance workers, the most accurate record of their number of hours actually worked was the service call cards. A service call card, or work order card, showed the address of the unit, the signature of the occupant and the time of performance of the work in question. (TR 54, 57-58, 258, 292). However, these service call cards were not introduced into evidence. Mr. Kirchdorfer asserted that the cards are the property of the Maxwell Air Force Base. It is noted that Respondent admitted that these cards were the most accurate reflection of the hours worked by Mr. Milham and Mr. Rudolph, but were not used for payroll purposes or timekeeping. (TR 292-293).

27. Upon their initial hire as air conditioning maintenance workers, Mr. Milham and Mr. Rudolph diligently signed in upon arriving at work and signed out upon departing. During the initial period of employment, these sign-in sheets accurately reflected the number of hours they worked. (TR 55-57, 111-113). After a "month or so," Mr. Bradley informed Mr. Milham that he need not sign-in any longer because Milham would be paid for forty hours of work per week regardless of the hours reflected on the sign in sheets. Thereafter, Mr. Milham was less consistent about signing in. Similarly, Charles Clark, who had hired Mr. Rudolph, informed Mr. Rudolph that there was no longer a need to sign in, as he would not be paid for any hours in excess of forty per week. (TR 109-112). At this point, Mr. Rudolph discontinued signing in.

28. Based upon Mr. Makowsky's computations in Complainant's exhibits 13, 14 and 15, it is apparent that Respondent did not use the sign-in sheets as a basis for the number of hours worked by Mssrs. Milham and Rudolph. Nevertheless, it is the finding of this Court that the sign-in sheets are an accurate reflection of the minimal hours worked by Mr. Milham, since he continued to sign in, though less consistently.

29. Referring to paragraphs 8, 9 and 10, it is established that the conformance classifications and minimum wage rates had been incorporated into the Maxwell contract for desk clerk, service call clerk, quality control, chief clerk and service call clerk. It has also been established that on several occasions, the conformance procedure and the requirement of paying subsequently classified employees the determined conformed rate were discussed with Mr. Kirchdorfer. (See paragraphs 20 and 21). Notwithstanding his knowledge, Mr. Kirchdorfer attempted to pay subsequently classified employees a lesser wage than the conformed rate.

30. According to Ms. Jolly, the contract administrator, the Respondent was advised that if a new wage determination was incorporated into the contract, Respondent was to invoice her office for increased costs under the new wage determination. Consequently, Respondent submitted invoices to the office which included increased costs for a quality control and service call clerk. Ms. Jolly discovered, though, that Respondent was not paying the employees the conformed rates previously incorporated into the contract, whereupon her office returned the invoices and advised Mr. Kirchdorfer to correct the invoices. (TR 177-178; CX-11). Ms. Jolly's office could not reimburse Respondent for the invoices because Respondent was paying less than it was billing. (TR 178).

31. It was the testimony of Ms. Jolly that each time a conformed classification position was vacated, Respondent would then submit a conforming rate at a lower rate than was originally conformed. (TR 174). Respondent did not refute this contention. Rather, Mr. Kirchdorfer corroborated it by stating at the hearing that any time he hired a new employee per an established classification, he had the authority to change the wage rate based upon his judgment as to the employee's qualifications and experience. (TR 283-284, 287). Mr. Kirchdorfer further claimed that Ms. Jolly at no time informed him that his belief was incorrect. However, the Court finds that the evidence overwhelmingly establishes that Mr. Kirchdorfer was aware that he could not lower the wage rate at his own discretion. That he was required to pay the conformed rate was explained to him on numerous occasions by Mr. Williams and Ms. Jolly. (See paragraphs 20 and 21). This requirement was also contained in the Maxwell contract. (See paragraph 12).

VACATION FRINGE BENEFITS

1. Pursuant to both the Maxwell and Patrick contracts, it was required that an employer furnish paid vacation upon completion of a specified length of service "with a contractor or successor." (CX-1 and 2). "Continuous service" is set forth as a prerequisite to eligibility for vacation benefits both in the contracts and the regulations. (CX-1 and 2; 29 C.F.R. § 4.173(B) (1985)). Though the term "continuous service" is not defined, the following guidance is provided by the regulations:

> The term "continuous service" does not require the combination of two separate periods of employment. Whether or not there has been a break in the continuity of service so as to make an employee ineligible for

> a vacation benefit is *dependent upon all the facts in the particular case.* No fixed time period has been established for determining whether an employee has a break in service. Rather . . . the *reason(s) for an employee's absence from work is the primary factor* in determining whether a break in service occurred.

29 C.F.R. § 4.173(b) (1985) (emphasis provided).

> Where an employee quits, is fired for cause, or is otherwise terminated (*except for temporary layoffs*), there would be a break in service even if the employee were rehired at a later date. *However, an employee may not be discharged and rehired as a subterfuge to evade the vacation requirement.*

29 C.F.R. § 4.173(b)(2) (1985) (emphasis provided).

2. Respondent's practice of not treating as "continuous any employee not hired within the first payroll period does not withstand the dictates of the regulations. According to the regulations, all the facts in the particular case must be examined, and the primary factor in determining whether there has been a break in service is the *reason* for the employee's absence from work. An arbitrary time period of five or less working days prohibits any due consideration of the particular facts of the case and the reasons for the absence.

3. Because the weight of the evidence supports the conclusion that Respondent intended for each of the predecessor's employees to continue working under Respondent's contracts, it is the Court's finding that the alleged break in service was no more than a "temporary lay off." Consequently, even if the employee was hired subsequent to the Respondent's first payroll period, the employee may still be a continuous employee for purposes of vacation entitlement. *See* 29 C.F.R. § 4.173(b)(2) (1985).

Frank Krzynowek

1. Krzynowek, an employee at Patrick Air Force Base, was hired by the predecessor contractor, Glen Allen, on November 23, 1978. Respondent began its contract on November 1, 1980.

2. Though Mr. Kirchdorfer testified that his company's record relative to Krzynowek's initial date of employment was inaccurate, this Court relies on the objective document of Respondent evincing that Krzynowek's first day of employment with Respondent was November 4, 1980. (RX-G).

3. It is the Court's finding that Krzynowek was a continuous employee for purposes of vacation entitlements pursuant to the regulations. (29 C.F.R. § 4.173(b) (1985)). There was no break in service, as the several interim days which the employee did not work were merely a temporary layoff due to Respondent's settling in at Patrick Air Force Base.[2]

4. The anniversary date on which Krzynowek was entitled to his first two week vacation with the Respondent pursuant to the Patrick Air Force Base contractual provisions was November 23, 1980. At this point he had earned two weeks of vacation, which he has still not received. Thus, Krzynowek is due the sum of $896.80, the total of two weeks of pay, as computed by the Department of Labor. (CX-1 and 17).

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[2] This Court rejects the testimony of Mr. Kirchdorfer that Krzynowek was allegedly terminated by the predecessor contractor, Glen Allen. (TR 226). This allegation is in no way corroborated. Rather, this assertion is rebutted by the records of the predecessor contractor which show that Krzynowek continued working until the contract expired. (CX-19, 20 and 21).

Carl Edge

1. Edge, an employee at Maxwell-Gunter Air Force Base, was hired by the predecessor contractor, Bailey, on October 1, 1980. (RX-C). Respondent began the contract on October 1, 1981.

2. Edge was initially employed by the Respondent on October 7, 1981 and continued working through July 2, 1982. (RX-C and H).

3. It is the Court's finding that Edge was a continuous employee for purposes of vacation entitlement pursuant to the regulations relative to "continuous service." (29 C.F.R. § 4.173(b) (1985)). There was no break in service, as the several interim days which the employee did not work were merely a temporary layoff due to Respondent's settling in at Maxwell-Gunter Air Force Base.

4. The anniversary date on which Edge was entitled to his first week of vacation with the Respondent pursuant to the Maxwell contractual provisions was October 1, 1981. (CX-13). At this point he was due one week of vacation. According to his testimony, Edge received the time off of one week, but did not receive the pay. (TR 137). Thus, Edge is due the sum of $277.60, representing one week of vacation benefits. (CX-13).

Neal O'Donnell

1. O'Donnell, an employee at Maxwell-Gunter Air Force Base, was hired by the predecessor contractor, Bailey, on November 6, 1980. (RX-D). Respondent began the contract on October 1, 1981.

2. O'Donnell was initially employed by the Respondent on October 5, 1981 and continued working through September 29, 1984. Since the first payroll period ended on October 6, 1981, there should be no question that he was a continuous employee even using Respondent's own

company policy. Though Mr. Kirchdorfer admitted at the hearing that O'Donnell was a continuous employee, it is noted that the business records of the Respondent relative to O'Donnell indicate he was *not* a continuous employee for purposes of vacation entitlement.[3] (RX-D).

3. It is the Court's finding that O'Donnell was clearly a continuous employee for purposes of vacation entitlement pursuant to the regulations relative to "continuous service." (29 C.F.R. § 4.173(b) (1985)). There was no break in service, as the several interim days which the employee did not work were merely a temporary layoff due to Respondent's settling in at the Maxwell-Gunter Air Force Base.

4. The anniversary dates on which O'Donnell was entitled his vacation benefits with the Respondent were:

November 6, 1981 – 1 week (CX-2)
November 6, 1982 – 2 weeks (CX-2)
November 6, 1983 – 2 weeks (CX-2)

O'Donnell testified that he had received and been paid for two separate two-week vacations with the Respondent. (TR 151-152). Therefore, he is due the sum of $277.60, representing the one week of vacation he earned on the anniversary date of November 6, 1981 for which he has not been paid. (CX-13).

5. Respondent has alleged that its exhibit "E", a check issued to O'Donnell in the amount of one week's pay, represents the disputed one week of vacation entitlement. However, O'Donnell testified that he received "two weeks twice." (TR 151). Also, Respondent's own records indicate that O'Donnell had worked during the payroll period

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[3] It appears that Respondent's exhibit I was altered several times with respect to O'Donnell's date of first employment with Respondent.

which the check represented. (RX-I). Accordingly, there is no evidence to substantiate Respondent's assertion that this check represents one week of vacation pay due the employee over and above the employee's regular wages for the week of work.

Walter Ferguson

1. Ferguson, an employee at Maxwell-Gunter Air Force Base, was hired by the predecessor contractor, Bailey, in March of 1981. (TR 159). Respondent began the contract on October 1, 1981.

2. Ferguson was initially employed by the Respondent within "a few days" after Respondent began the contract. (TR 161).

3. Respondent has admitted that Ferguson is due one week of vacation which accrued on the anniversary date in March of 1982, for which he has neither received time off nor been paid. (TR 238-239). Thus, Ferguson is due the sum of $277.60, representing one week of vacation entitlement. (CX-13).

OVERTIME WAGES

Johnny Milham

1. Milham, a Maxwell employee, was hired by Respondent as an air conditioning mechanic in July of 1983 to perform evening and weekend work. It was Mr. Milham's testimony that he worked generally from 3:00 or 4:00 p.m. until 12:00 or 1:00 a.m. Monday through Friday, and also during the days on Saturday and Sunday. (TR 51-52).

2. As was previously stated in paragraph 27, Mr. Milham consistently signed in and out during his initial period of employment until he was told by Mr. Bradley

that there was no need to sign in, since he was going to paid for only forty hours per week of work. (TR 55). Notwithstanding the fact that Mr. Milham signed in less consistently toward the latter period of his employment, the sign-in sheets accurately represent the number of hours Mr. Milham worked during his initial period of employment. (TR 56). In any event, the hours logged on the sign-in sheets reflect the minimum hours which Mr. Milham worked each week.

3. Mr. Milham testified at the hearing that he worked anywhere between fifty and seventy hours per week. (TR 68). This estimation comports with the sign-in sheets which were used by the compliance officer to compute the wages due to Mr. Milham. (CX-14).

4. The wage transcription and computation sheet completed by Mr. Makowsky relative to Mr. Milham evinces the fact that the Respondent consistently paid Mr. Milham for approximately forty hours of work per week, despite the fact that the employee consistently logged in greater than forty hours per week on the sign-in/sign-out sheets. (CX-14). Consequently, Mr. Milham is due backwages for the hours he worked in excess of the forty hours per week for which he was paid. This amounts to a total of $969.38. (CX-14).

5. Upon comparison of Respondent's certified payroll records with the hours reflected on the sign-in/sign-out sheets, it is evident that Respondent's payroll records were grossly inaccurate. The certified payroll records reflect that Mr. Milham never worked on Saturdays or Sundays. To the contrary, the evidence of record substantiates the fact that Mr. Milham was hired to work weekends and did regularly work on the weekends. (CX-14; TR 52-54).

James Rudolph

1. Mr. Rudolph was hired by Respondent as an air conditioning mechanic under the Maxwell contract. Upon being hired, he was told by Charlie Clark that he would earn $8.56 per hour and would work forty hours per week. (TR 109-110).

2. In actuality, Mr. Rudolph was required to work seven days per week, working similar shift hours as Mr. Milham, 4:00 p.m. to 12:00 midnight Monday through Friday plus weekends.

3. As did Mr. Milham, Mr. Rudolph consistently logged his hours on the sign-in/sign-out sheets during the initial period of his employment. Thereafter, Mr. Clark informed him that there was no need to sign in because he would not be paid for overtime work. (TR 111-112).

4. Because no basic payroll or time records were available to Mr. Makowsky during his second investigation of Respondent, Mr. Makowsky reconstructed the number of hours Mr. Rudolph had worked. (TR 190-191, 203-204). Following his personal interview with Mr. Rudolph, Mr. Makowsky computed the backwages which were due Mr. Rudolph for overtime work. These computations were based upon Mr. Rudolph working minimally fifty-five hours per week for 75% of the weeks which he worked for Respondent. Respondent in fact paid Mr. Rudolph for forty hours of work per week. (TR 203; CX-15).

5. Mr. Rudolph is due backwages totalling $2,781.00 for hours worked overtime during his employment with Respondent. (CX-15). These computations are supported by testimony at the hearing that Mr. Rudolph generally worked seven days per week, with his shortest work week consisting of fifty-five hours of work. (TR 110-111).

CONFORMED CLASSIFICATIONS AND WAGES

1. The following conformed classes and corresponding minimum wage rates were properly confected and incorporated into the Maxwell Contract by amendment:

Service Call Clerk	$ 6.00 per hour	(CX-4)
Desk Clerk	$ 5.00 per hour	(CX-4)
Chief Clerk	$ 7.50 per hour	(CX-5)
Quality Control	$10.25 per hour	(CX-5)
Service Call Clerk	$ 7.06 per hour	(CX-6)

2. Upon the incorporation of the conformed classes and minimum wage rates into the Maxwell contract, Respondent was required to pay subsequent employees hired into the conformed class the specified minimum wage. (CX-2; TR 83, 206; 29 C.F.R. § 4.6(b)(2)(i) and § 4.6(b)(2)(i)(v) (1985)). It is explicitly stated in the regulations that, once the conformed class and rate are determined pursuant to the specified conforming procedure, this wage rate must be paid to all employees performing in the classification from the first day on which contract work is performed by them in the classification. Furthermore, failure to pay the employees the compensation agreed upon by the "interested parties" and/or finally determined by the Wage and Hour Division shall be a violation of the Act and this contract. The "interested parties" include the contractor, the employee and the contracting officer. (29 C.F.R. § 4.6(b)(2)(ii) (1985)).

3. Despite the mandate of the regulations, Respondent testified at the hearing that he unilaterally lowered the conformed wage rate for subsequently hired employees without the approval of the contracting officer, paying the wage rate he thought was commensurate with the particular employee's qualifications and experience. (Tr. 253, 283-284, 287).

4. Respondent was required per the regulations and the contract to pay employees subsequently hired into the conformed class the agreed upon minimum wage rate as incorporated into the contract. This requirement was discussed with Mr. Kirchdorfer and Respondent's project managers on numerous occasions. (See paragraphs 20, 21 and 29).

Charles Clark

1. Mr. Clark, an employee of the Respondent at Maxwell-Gunter Air Force Base, was hired to perform quality control work at a rate of $9.00 per hour. (RX-J).

2. The contractual conformed rate for quality control was $10.25 per hour. (CX-3 and 5).

3. Respondent failed to pay Mr. Clark the required minimum wage rate. Therefore, Mr. Clark is due the sum of $3,820.76 as a result of Respondent's violations.[4] (CX-10, 11 and 15).

John Davis

1. Mr. Davis was initially hired by Respondent at Maxwell-Gunter Air Force Base as a service call clerk. During the last month of his employment with Respond-

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[4] The fact that Respondent alleges to have additionally paid Mr. Clark $240.00 per month for housing rent is of no avail. The regulations provide that the employer may include as part of the applicable minimum wage the reasonable cost, as determined by the Administration, of furnishing an employee with "board, lodging, or other facilities" in situations where such facilities are customarily furnished to employees for the convenience of the employees. (29 C.F.R. § 4.167 (1985)). Respondent in the case at bar offered no evidence that this was a situation where "such facilities are customarily furnished to employees." Moreover, such cost for rent has not been approved by the Administrator or his authorized representative.

ent, Mr. Davis performed quality control work. That Mr. Davis performed this type of work is supported by his description at the hearing of his duties. (TR 120-123). This Court rejects Mr. Kirchdorfer's assertion that Mr. Davis performed no quality control work. Mr. Davis testified that Charlie Clark, another quality control worker, instructed him as to the responsibilities the position entailed. (TR 126). Also, Mr. Davis stated that he would inspect the houses after the maintenance work had been done, rather than before. (TR 122-123). Thus, there is ample evidence supporting the assertion that Mr. Davis performed quality control work during one month of employment with Respondent.

2. The contractual conformed rate for quality control was $10.25 per hour. (CX-3 and 5).

3. Respondent failed to pay Mr. Davis the required minimum wage rate. Therefore, Mr. Davis is due the sum of $293.09 as a result of Respondent's violations. (CX-10, 11 and 15). This computation is based upon one month of quality control work.

Hal Jones

1. Mr. Jones, an employee of the Respondent at Maxwell-Gunter Air Force Base, was hired to perform quality control work at a rate of $10.00 per hour. (RX-K; CX-12).

2. The contractual conformed rate for quality control was $10.25 per hour. (CX-3 and 5).

3. Respondent failed to pay Mr. Jones the required minimum wage rate. Therefore, Mr. Jones is due the sum of $190.00 as a result of Respondent's violations. (CX-10 and 15).

Angela Smith

1. Ms. Smith was hired by Respondent under the Maxwell Contract as a desk clerk at a rate of $4.00 per hour. (CX-15).

2. The contractual conformed rate for a desk clerk was $5.00 per hour. (CX-4).

3. Respondent failed to pay Ms. Smith the required minimum wage rate. Therefore, Ms. Smith is due the sum of $955.48 as a result of Respondent's violations. (CX-15).

Julie Tatum

1. Ms. Tatum was hired by Respondent under the Maxwell contract as a desk clerk at a rate of $4.00 per hour. (CX-15).

2. The contractual conformed rate for desk clerk was $5.00 per hour. (CX-4).

3. Respondent failed to pay Ms. Tatum the required minimum wage rate. Therefore, Ms. Tatum is due the sum of $905.86 as a result of Respondent's violations. (CX-15).

Christine Chodnicki

1. According to Respondent's records, Ms. Chodnicki was hired under the Maxwell contract as a desk clerk at the rate of $5.00 per hour. (RX-A). However, upon applying for a job, Ms. Chodnicki specifically applied for the position of service call clerk. She was told by Charlie Clark that service call clerk was the title of the position for which she was hired. (TR 89).

2. Ms. Chodnicki's description of the work she performed supports the Court's conclusion that her duties were those of a service call clerk, rather than a desk clerk. She was trained by John Davis, who was initially employed as a service call clerk. (TR 89-90). Her respon-

sibilities involved taking the telephonic requests for maintenance, completing the work orders and assigning the work orders to the maintenance men. (TR 89-91).

3. The contractual conformed rate for service call clerk was $7.06 per hour. (CX-6).

4. As a result of Respondent's misclassification of Ms. Chodnicki, she is due the sum of $2,224.80, representing wages for work as a service call clerk. (CX-15).

Nelson Longcrier

1. Mr. Longcrier was hired by Respondent under the Maxwell contract as a supply clerk at a rate of $6.00 per hour. (RX-L). This was the proper contractual conformed rate for a supply clerk. (CX-11).

2. However, Mr. Longcrier eventually began performing quality control work. Mr. Longcrier attested at the hearing that he performed supply clerk duties and those of quality control conjointly. (TR 168-169). The contractual conformed rate for quality control was $10.25 per hour. (CX-3 and 5).

3. The Court finds that the evidence of record supports the assertion that Mr. Longcrier performed quality control work in addition to supply work. According to Mr. Longcrier, each morning Mr. Clark, another quality control worker, would present him with a list of houses requiring inspection. (TR 169). The testimony of Ms. Chodnicki corroborates Mr. Longcrier's involvement in quality control work. (TR 97-98).

4. Mr. Makowsky's computation of monies due Mr. Longcrier are based upon the employee spending 25% of his time performing quality control work. This percentage is supported by Mr. Longcrier's testimony, which indicated that he spent between 25% to 50% of his time in the performance of quality control work. (TR 169-170).

5. Consequently, Mr. Longcrier is due the sum of $935.00 as a result of Respondent's misclassification of the employee. This amount represents 25% of Mr. Longcrier's time as a quality control worker. (TR 202; CX-15).

INELIGIBILITY TO RECEIVE FURTHER FEDERAL CONTRACTS

1. Relative to the issue of the contractor's ineligibility to receive further federal contracts, the following rule is provided:

> Section 5 of the Act (Service Contract Act) provides that any person or firm found by the Secretary or the Federal agencies to have violated the Act shall be declared ineligible to receive further Federal contracts unless the Secretary recommends otherwise because of unusual circumstances.

29 C.F.R. § 4.188(a) (1985).

2. The violator of the Act has the burden of establishing the existence of unusual circumstances to warrant relief from the debarment sanction. (29 C.F.R. § 4.188(a) (1985)).

3. The following guidelines are set forth in the regulations regarding whether relief from the debarment sanction is warranted:

> (3)(i) The Department of Labor has developed criteria for determining when there are unusual circumstances within the meaning of the Act. . . . Thus, where the respondent's conduct in causing or permitting violations of the Service Contract Act provisions of the contract is willful, deliberate or of an aggravated nature or where the violations are a result of culpable conduct such as culpable neglect to ascertain whether practices are in violation, culpable disregard of whether they were in violation or not, or culpable failure to comply with recordkeeping requirements

(such as falsification of records), relief from the debarment sanction cannot be in order. Furthermore, relief from debarment cannot be in order where a contractor has a history of similar violations, where a contractor has repeatedly violated the provisions of the Act, or where previous violations were serious in nature.

(ii) A good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance are generally prerequisites to relief. Where these prerequisites are present and none of the aggravated circumstances in the preceding paragraph exist, a variety of factors must still be considered, including whether the contractor has previously been investigated for violations of the Act, whether the contractor has committed recordkeeping violations which impede the investigation, whether liability was dependent upon resolution of a bona fide legal issue of doubtful certainty, the contractor's efforts to ensure compliance, the nature, extent, and seriousness of any past or present violations, including the impact of violations on unpaid employees, and whether the sums due were promptly paid.

29 C.F.R. § 4.188(b)(3)(i) (1985).

4. This Court finds that there are no unusual circumstances to warrant Respondent's relief from the debarment sanction. Respondent's violations of the Service Contract Act and the Contract Work Hours and Safety Standards Act were of a deliberate nature, as Mr. Kirchdorfer had knowledge of the Act's requirements of recordkeeping, conforming procedures and payment of the conformed minimum wage rate; (See paragraphs 20, 21 and 29); Respondent was investigated on three separate occasions relative to the Maxwell-Gunter Air Force Base Contract; (TR 189-190); there was a lack of cooperation on the part of

Mr. Kirchdorfer throughout these investigations, as shown by his failure to provide accurate bookkeeping records and his failure to respond to either of Mr. Makowsky's certified letters or his phone calls; (See paragraph 24); there were investigations by the Wage and Hour Division into alleged violations of Respondent prior to the Maxwell contract which resulted in an injunction against the Respondent in the 1960's. Mr. Williams, one of the compliance officers, stated that the Respondent had a "considerable investigative history." (TR 79).

ORDER

It is hereby ORDERED, ADJUDGED and DECREED that:

1. Respondent, Skip Kirchdorfer, Inc. pay the sum of $15,135.54, to be distributed to the following employees for the payment of wages and vacation benefits due as a result of Respondent's violations of the Service Contract Act and the Contract Work Hours and Safety Standards Act:

Frank Krzynowek	$ 896.80
Carl Edge	$ 277.60
Neal O'Donnell	$ 277.60
Walter Ferguson	$ 277.60
Johnny Milham	$ 969.38
James Rudolph	$2,781.00
Charles Clark	$3,820.76
John Davis	$ 293.09
Hal Jones	$ 190.00
Angela Smith	$ 955.48
Julie Tatum	$ 905.86
Christine Chodnicki	$2,224.80
Nelson Longcrier	$ 935.00

2. It is further ORDERED that Respondent shall pay to the aforementioned employees interest in accordance with 28 U.S.C.A. 1961 (1986) on all past due wages and vacation benefits outstanding.[5]

3. It is further ORDERED that the United States Air Force release to the Employment Standards Administration, U.S. Department of Labor, any monies currently being withheld from Respondent, for distribution to the employees specified in the preceding paragraph. Additionally, such released funds shall be credited toward the amounts due in the preceding paragraph of this Order.

4. It is further RECOMMENDED that the Secretary of Labor take no action to relieve Respondent from the ineligible list provisions of Section 5(a) of the Service Contract Act. (41 U.S.C. § 354(a)).

Entered this 28th day of November, 1986, at Metairie, Louisiana.

/s/ James W. Kerr, Jr.
JAMES W. KERR, JR.
Administrative Law Judge

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[5] The fact that the McNamara-O'Hara Service Contract Act makes no mention of the awarding of interest does not preclude such an award. As stated by the Supreme Court in *Rodgers v. United States*,

> . . . the failure to mention interest in statutes which create obligations has not been interpreted by this Court as manifesting an unequivocal congressional purpose that the obligation shall not bear interest. . . . For in the absence of an unequivocal prohibition of interest on such obligations, this Court has fashioned rules which granted or denied interest on particular statutory obligations by an appraisal of the congressional purpose in imposing them and in the light of general principles deemed relevant by the Court . . .

332 U.S. 371 at 373 (1947).

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